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EPA, industry disagree over rule's effect on transaction costs

PROPOSED COST RECOVERY RULE TO EXPAND SCOPE OF INDIRECT COSTS

EPA's proposed cost recovery rule issued July 29 allows the agency to charge private parties at a rate that reflects 100% of indirect program costs. Under the rule the indirect costs category has been expanded to include research and development, depreciation, and preliminary site costs. EPA says the rule will cut transaction costs. But industry proponents oppose it, saying transaction costs will rise because fewer potentially responsible parties will be willing to settle. Some sources say the rule is flawed because it makes oil and chemical companies pay twice for overhead costs they already pay in Superfund taxes. Story on page 3.

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Rule will deter settlements industry proponents argue

PROPOSED COST RECOVERY RULE TO EXPAND INDIRECT COST RATE

EPA's proposed cost recovery rule, released July 29, revises its indirect cost rate to reflect all indirect costs incurred by the Superfund program as a whole. The change in the way the agency allocates indirect costs means "we'll be demanding more costs," from potentially responsible parties, said Office of Waste Programs Enforcement head Bruce Diamond at a press briefing. The rule also clarifies what costs the agency can recover and therefore will reduce both PRPs' and EPA's transaction costs, Diamond added.

But the new rule disturbs industry proponents. One industry source charges that the rule will "make it harder to settle because it drives up costs." This will be one more argument on the side that won't settle," he adds.

An EPA source counters that the rule will save transaction costs for both the agency and PRPs because EPA "will not have to re-litigate [EPA's recovery costs] at each site. We're hoping that it will reduce some of the issues that ultimately go to court or that have to be negotiated."

Clarified in the new rule are the costs EPA can recover, how they are determined, and the information the agency needs to back its cost recovery actions. The rule also outlines an accounting of costs and sets a statute of limitations for cost recovery actions.

The rule additionally expands what EPA can include in its indirect costs. Added to the indirect cost tally are research and development, depreciation and preliminary site costs, according to Sallyanne Harper, EPA's Office of the Comptroller's financial management director. With the indirect cost expansion and the all-inclusive rate methodology, the indirect cost rate is expected to increase by a factor of three, she said.

Recovery costs for Superfund cleanups include both direct and indirect costs. Direct costs are those that apply to actions at specific sites, according to the rule. Indirect costs, also known as overhead, are "operation and management costs" that support both site-specific actions and the total Superfund program, the rule says.

An industry source points out that the agency is trying to charge for indirect or overhead costs that chemical and oil companies already contribute to in the form of specific Superfund taxes. An EPA source agrees that the Superfund program is funded in part from those specific taxes, but adds that it is additionally supported by general tax revenues.

Another industry source says the rule does not purport to regulate industry, but to "regulate" the federal judiciary. "I think the regulations are farcical," the source says. "These regulations would dictate to the courts and prescribe that 'EPA wins' any time that EPA seeks cost recovery, even for excessive, inappropriate, or totally unrelated expenditures," he says.

"It's too bad that the agency feels it has to put such a tough face on all the time," an industry source says. "It really needs industry to work with them."

Previously, the agency used a conservative rate methodology that charged only a portion of its indirect costs to PRPs responsible for recovery costs, according to the rule. Diamond said the shift from the conservative methodology came because court cases in the past few years have backed the indirect costs EPA wants to claim. The proposed rule was expected to be released in early 1991, according to an EPA attorney (see *Superfund Report*, Dec.19, 1990, p.22). Diamond says that the rule was late in coming because a number of complicated questions had to be worked out and coordinated within a variety of offices. Another EPA source says other agencies, such as the Office of Management & Budget, were involved in the process.

EPA decided to implement a rule to enforce its cost recovery changes because all cases involving the rule will be heard by the U.S. Court of Appeals for the D.C. Circuit. "Any legal challenge will be resolved by one court once and for all," Diamond said at the briefing.

The rule is not retroactive. Once a final rule is effective, the agency will apply the new rate to "all cost recovery actions that have not been finally resolved," the rule says. With the proposed rule, a new rate that changes yearly will be determined for each region. To compute indirect costs for a specific site, "the regional indirect cost rate is multiplied by regional Superfund site hours charged to the site," the rule says. At orphan sites, where there is no PRP and EPA is paying for the cleanup, "indirect costs allocated to the site would not be reallocated to other sites and would not be pursued," the rule says.

In the proposed rule, preliminary site costs have now been included in the indirect cost rate because many sites do not advance to the national priorities list, Harper said. EPA will treat these costs the same way private businesses treat "up-front" costs, in which they distribute the costs of their estimates and bids on a pro rata basis to all clients, the rule says. The newly-added depreciation costs will be calculated for "non-site-specific capital equipment" that costs more than $5,000 per unit, the rule says. Examples are computer and lab equipment and furniture, Harper said. Indirect costs termed research and development costs are general Superfund expenditures for scientific studies, such as those involving the Superfund Innovative Technology Evaluation (SITE) program, the rule says. However, the costs of "implementing innovative technology at a site" as a remedy are labeled direct costs, the rule says.

Since EPA began recovering costs, the agency has made settlements with PRPs for $617-million in cost recovery actions, according to Diamond. The agency has collected $500-million of that total, he added.

De Minimis Liability

NURSING HOME RESIDENTS HANDED SETTLEMENT OFFER, HASTY DEADLINE BY EPA

EPA recently handed senior citizens in a Michigan nursing home an offer: pay the agency $1,000 or stand exposed to potentially huge liability at a nearby Superfund site. In one of its first attempts at a de minimis settlement since issuing its de minimis guidance in June, the agency is getting heat from members of Congress, who say EPA has gone too far and are urging Administrator William Reilly to intervene immediately.

Some of the residents who received letters from EPA allegedly sent only one or two used batteries to the site.

EPA is "following the letter of the law, but not the spirit of the law," says a congressional staffer following the case. "In our opinion this amounts to extortion."

In response to letters from congressmen blasting EPA's move, the agency has postponed the deadline for would-be settlers to sign an agreement with EPA, according to an agency source.

EPA contends that the settlement provides individuals an opportunity for protection from huge transaction costs and ultimately cleanup costs potentially amounting to much more than the settlement figure. De minimis settlers would be exempt from future liability and protected from private parties' third-party lawsuits.

"Our intent is to protect these individuals," a Region V source says. The agency is eager to dispel what it sees as distorted views of the settlement scheme, the source says.

In what an EPA attorney says is the largest proposed de minimis settlement to date, the agency created a three-tier settlement structure for 1,400 minor waste contributors at the H. Brown, Inc. site in Walker, MI. Falling under the third tier are some residents of area nursing homes and retired persons living on Social Security payments of little over $500 per month, according to staffers with Rep. Paul Henry (R-MI), in whose district the site is located. The staffer says the office has been flooded with letters and phone calls since area residents received EPA's settlement offer.

The Region V source says EPA will consider individuals' ability to pay and adjust the settlement amounts accordingly.

The site, once an open dump according to EPA, was used as a battery recycling operation from 1961 to 1982. The owner bought batteries from local businesses and residents, and EPA used waste-in records from these transactions to compile a list of de minimis parties. The first tier includes parties that sent up to 100 gallons of waste to the site; the second tier, 101 to 1,000 gallons, and the first tier, 1,001 to 10,000 gallons. EPA's settlement offers to the second and first tier groups are $5,000 and $10,000, respectively, according to the Region V source. Half of each amount is to go toward cleanup, the other half is a premium on the settlement, the source says.

But lawmakers say the structure is flawed. Individuals who brought one or two batteries were "stuck in the same boat" with businesses that sent up to 1,000 batteries to the site, the Henry staffer says, calling EPA's process "very discriminatory."

EPA Region V's "take it or leave it" approach has "unnecessarily frightened and rightfully angered our constituents," says an August 3 letter to Reilly from members of Michigan's congressional delegation, including Sens. Carl Levin (D) and Donald Riegle (D). The parties received EPA's offer in mid-July, and the agency held a public meeting July 30. The agency gave potential settlers until August 7 to inform the agency of their intent with respect to the proposed agreement. "We can only infer that the EPA Region V office doesn't want to give these parties adequate time to review their legal options and is trying to coerce confused individuals into paying," the letter says. Other signatories to the letter are Reps. Henry, Guy Vander Jagt (R) and Fred Upton (R).

The Region V source takes issue with the lawmakers' contention that under the settlement structure, parties responsible for 8% of the waste would pay close to 40% of the cleanup costs. "This is a gross misstatement," the source says. The agency did not send letters to all 1,400 parties primarily because it could not locate all of them, and agency experience shows that about two-thirds of those contacted will agree to settle, the source says. Therefore, de minimis parties' total share of cleanup costs will amount to no more than 10%, "and probably more like 7%," the source says.

Major PRPs at the site have contended that the agency was not asking for enough from the de minimis parties "so it's pretty certain" the majors will sue non-settling parties for considerably more than what the agency is asking, the source says.

65% premium tacked on to each signing party's cost share

MINORITY OF DE MINIMIS PARTIES AGREE TO PRE-ROD SETTLEMENT

Just over one-third of the de minimis parties at a Pennsylvania Superfund site have agreed to a pre-record of decision settlement, which exempted the parties from liability suits brought by EPA or by third parties linked to the site. The settlement, supported by 170 of the 453 de minimis parties, is the first since EPA issued a final guidance June 2 aimed at getting de minimis parties to settle early to avoid high transaction costs and lengthy negotiations.

An industry attorney who represented a group of 125 de minimis parties says that more parties did not settle because the agency did not provide the parties with enough incentives during the settlement process. Of the 125 in the

attorney's group, 75 agreed to the early settlement, he says. Although the settlement was successful in raising funds for EPA's cleanup, he asserts that the agency still must settle with 283 de minimis parties. "You can't have an effective lawsuit against 283" parties, he adds.

The agreement, at the Tonolli site in Nesquehoning, PA, provides the parties with an "equitable settlement and gives them a covenant not-to-sue. You can't get anything better than that under Superfund," an EPA source says. The agreement adds a 65% premium of each party's estimated cost share in addition to the cost share itself. The premium is factored in to cover the risks the agency bears in case the remedy costs more than expected, an EPA source says. "The region feels comfortable that the settlement amount, along with the premium, is enough to protect the cost overruns," another EPA source says.

The source emphasized that the same settlement might not be offered again to the remaining de minimis parties. The settlement was completed in about six months--one year less than some de minimis party settlements, he says. He says he does not know why more parties did not agree to the settlement.

To entice more of the parties to sign, the industry attorney says the agency should have engaged in a "sales" effort. Also, the attorney says, the pre-ROD settlement does not encourage negotiation, but is a "notice and comment procedure."

The attorney adds that the agency has encouraged the de minimis parties to organize as a group, but there is no incentive for such an organization to develop because the settlement deal was offered to every party, regardless of each party's involvement in a group. A representative of one of the de minimis parties that did not settle says that the extreme diversity between small and large de minimis parties would have made a consensus nearly impossible, and that EPA should have been more sensitive to that diversity. According to EPA's breakdown of cost, some of the de minimis parties are responsible for as little as $500 while the largest de minimis party was cited for $549,000. Most of the larger de minimis parties did not accept the offer, an industry attorney says.

The de minimis party representative also says that better results could have been obtained if the time frame for negotiations had been longer.

According to the new guidance issued in June, regional EPA officials are expected to provide individual responsible parties with waste contribution information and estimates of cleanup costs (see *Superfund Report*, June 17,1992, p.3). At the Tonolli site, Region III officials held a meeting in January to discuss the settlement with the site's de minimis parties, guided by only a rough draft of a feasibility study and a "guesstimate" of the cost of the remedy, according to a Region III official. The parties were later sent a final consent order, a Region III source says.

A source with one of the larger de minimis parties that accepted the settlement says some of the smaller parties may not have settled because they did not understand Superfund and "probably don't have a good appreciation for their liability." She says there might have been a consensus to settle had EPA worked more closely with all of the parties. An EPA source says the agency tried to provide the parties with the information they needed quickly, and speculates that some may not have been able to read the documents in time.

Through the settlement, EPA will receive $3.5-million from the early settling parties, which must be paid no more than a year after the agreement is made final, following the public comment period. Although the agency allows de minimis parties to pay in two installments, some of the parties, particularly small businesses, could not afford to make the payments, another EPA source says.

Many of the de minimis parties are scrap dealers, brokers or recyclers. One representative of a fairly large de minimis party that refused EPA's offer claims it was unfair to scrap dealers responsible for five-figure costs and up. Reducing the settlement amount for scrap dealers or even eliminating their liability at the site has become the focus of a group formed by some of the dealers (*see related story*).

One de minimis party that is responsible for costs in the $500,000 range accepted the settlement offer because it was more favorable than the agreement EPA first proposed. The party also was swayed by the offer's inclusion of no reopeners, a source with the party says. "When you looked at everything, the dollars seemed right to put one behind us," the source says, adding that the company has incurred a lot of transaction and cleanup costs at other Superfund sites. "It was a business decision," she says.

Group met with EPA, wants to set precedent with PA site

SCRAP DEALERS GROUP WANTS EXEMPTION FROM SUPERFUND LIABILITY

A handful of scrap dealers who are de minimis parties at a Pennsylvania Superfund site have formed a group to ask EPA to exempt scrap dealers from liability at Superfund sites because the group fears the liability will put them out of business. The group, Recyclers for a Clean Environment (RaCE), is currently pursuing changes at the Tonolli Superfund site, but the group's efforts are also aimed at launching a nationwide campaign against scrap dealers' liability at any Superfund site (*see related story*).

"If they don't change the law, we are out of business," says Wayne Walvoord, who heads RaCE.

The group believes that scrap dealers at the Tonolli site did not ship waste for disposal, and therefore should not be held liable, Walvoord says. The way the law is structured, however, it would appear the dealers are liable, he says. The group maintains that the law should be changed.

About 10% of the sites on the national priorities list involve recycling operations, EPA says. Scrap dealers act as

"collection agents"—buying scrap, separating, sorting and packaging it before selling the materials to recyclers, Walvoord says, adding that they do not deal in waste treatment and disposal.

A June 22 letter to Walvoord from EPA's Office of Waste Programs Enforcement says EPA acknowledges the concerns of scrap dealers regarding Superfund liability and recognizes the limits on a party's resources for cleanups. "Consequently, it is EPA's policy to consider, as part of a settlement offer, the party's ability to pay," the letter says.

Following receipt of the letter, the group met with EPA in July to discuss its concerns. An EPA source says the group's concerns "have been transmitted to management." Some of the changes the group is seeking fall under regulations within the Resource Conservation & Recovery Act (RCRA) program, according to an EPA official.

RaCE is pushing for an exemption from liability at the Tonolli site in order to set a precedent for other Superfund sites looking at dealers' liability. Walvoord says that the scrap dealers have "done nothing wrong" at the Superfund site and that the cost EPA is asking them to pay "would place a hardship on the companies."

Walvoord, who also represents a fairly large de minimis party belonging to RaCE that refused to accept the settlement offer, claims that an early settlement offer at the Tonolli site was unfair to scrap dealers, some of whom were asked to pay amounts in five-figure costs and up. As a secondary goal, RaCE is asking EPA to reduce the settlement amount for scrap dealers. Many of the 453 de minimis parties at the site are scrap dealers, brokers or recyclers.

RaCE originally sent mailings out to 125 people and is trying to increase its mailing list to 400 or 500, Walvoord says.

Congress

EPA OVERSIGHT AT FEDERAL FACILITY SITES SORELY LACKING, GAO SAYS

EPA has not met its oversight responsibilities at federal facility Superfund sites and lacks a clear strategy for the anticipated hundreds-fold expansion of these sites over the next several years, according to the congressional General Accounting Office. EPA further lacks a system for assessing the potential risks at federal facilities relative to other sites and other environmental problems, GAO says.

"Whatever decisions are ultimately made about the risks and priorities of federal cleanups, EPA still has much to do to develop its oversight program for these activities," Richard Hembra, director of GAO's Environmental Protection Issues division, told a House subcommittee July 28.

Defense Department and Energy Department officials discussed the need for clarification with respect to which regulatory agency has authority over federal facility cleanups, saying confusion over the issue leads to delays and wasted time and resources due to a duplication of efforts.

Hembra said current estimates of how much the universe of federal facility sites will increase and of how much the cleanups will cost the government—while staggering—are probably too conservative.

Asked whether GAO has a clear sense of what the ultimate cleanup costs will be, Hembra said: "I get this mental picture of storm clouds on the horizon. You know something's coming but you don't know how bad it's going to be." Cleanup cost estimates for Defense Department and Energy Department sites have risen sharply over the past several years, raising doubts about current projections, Hembra said. In 1988, DOD estimated its total cleanup costs at between $8.5- and $12.8-billion; the estimate now stands at $24.5-billion. At DOE, projections have shot up from tens of billions in the early 1980s to $160-billion today.

In two days of hearings, July 28 and 29, the House Public Works & Transportation subcommittee on investigations and oversight examined federal facility cleanups under the Superfund program.

Rep. Norman Mineta (D-CA) expressed frustration at what he called "inaction" among EPA and federal agencies in cleaning up federal facility sites. "If federal agencies are not going to lead the way, how can we expect private companies [to take on these cleanups]?" he said, continuing, "We're going to have to bang heads among the agencies and say 'this has gone on long enough,' and get somebody off the dime."

Thomas McCall, EPA's acting deputy assistant administrator for federal facilities enforcement, attributed lagging progress to the newness of the program. "It's a new program.... EPA was late on the scene on this" but is making considerable progress, he said. EPA created its Office of Federal Facilities Enforcement in February 1991.

Agency and outside sources have long said EPA lacks the resources to oversee the vast universe of federal facility cleanups; according to GAO, limited EPA resources "have been a major factor in EPA's slow progress in getting federal sites evaluated for the Superfund program." Asked whether the agency has adequate resources to fulfill its role in federal facility cleanups, McCall said, "I don't know. We're looking at our workload."

McCall focused largely on the need for increased public participation in cleanup decisions at federally owned sites. He cited an ongoing dialogue among federal agencies and the public which is aimed at increasing the accountability in the

decision-making process for federal facility cleanups. DOD and DOE have met with state agencies and the public periodically over the past several months to discuss ways to improve the cleanup process at federal facilities (*see related story*). "These efforts will, we believe, contribute to a climate of greater openness to and increased awareness of the complexity of environmental issues at federal facilities and will provide for more credible decision-making," McCall said in his statement to the subcommittee.

Confusion over which regulatory agency has top authority over federal facility cleanups is a key concern at DOD, according to Thomas Baca, deputy assistant secretary of defense for environment. Baca told the subcommittee DOD cannot proceed with confidence toward prompt cleanup of its sites when it is unclear who has lead authority. "We welcome and seek regulatory agency involvement but everybody cannot be the decision-maker. And even though they have the same objective, all the various 'rulebooks' can't be used," Baca said in his statement to the House panel. DOD further would like a freer hand in transferring property at closed military bases once it is cleaned up, Baca said, backing legislation which would require that DOD consult with EPA on property transfers but not requiring that the agency concur with the move.

DOE's Paul Grimm echoed the concern about regulatory overlap, telling the subcommittee that duplicative requirements and authorities remain a difficulty in DOE cleanup efforts. Grimm is principal deputy assistant secretary for Environmental Restoration & Waste Management. He further called for a national dialogue on environmental risk management, saying current restoration programs are driven by "a mosaic of federal and state laws and regulations and provisions of site-specific agreements, rather than a national approach" to reducing risk.

LAWMAKERS EXAMINE CLEANUPS AT ROCKY MOUNTAIN ARSENAL, HANFORD

A plan to turn a Colorado Superfund site into a wildlife refuge is seen by some as a good case study to determine whether or not early land-use decisions could expedite Superfund cleanups, but state officials and local residents are concerned that the decision—to turn part of the U.S. Army facility over to the bunnies and birds as one source put it—will mean a less protective cleanup. State and local representatives discussed their concerns before a House subcommittee July 29.

Lawmakers also heard from Energy Department and state officials on the massive Hanford cleanup, which is expected to take 30 years and cost up to $50-billion. Echoing sentiments of DOE and the Defense Department from the previous day's hearings, a DOE official identified clashes between state and federal agencies at federal facilities as a sticking point in the cleanup process.

The House Public Works & Transportation subcommittee on investigations and oversight continued its series of hearings on the Superfund program with a look at federal facility cleanups.

Colorado officials are concerned that the Rocky Mountain Arsenal site near Denver will not receive an adequate cleanup if its ultimate use is as a haven for wildlife. "The concept is okay," said David Shelton, director of hazardous materials and waste management at the Colorado Department of Health. "Our concern is that it will cause a diminished cleanup at the site."

The House July 7 passed a bill that would designate a portion of the RMA site as a national wildlife refuge. EPA, concerned about the scope of the cleanup under the legislation, wants to work with the Senate as it considers the bill, agency sources say (see *Superfund Report*, July 29, 1992. p. 7).

Tracking activities at a site where the land-use question is resolved up front could show whether making that decision early can help speed cleanup, a subcommittee staffer said. He said this is one of the key issues lawmakers are looking at in assessing Superfund. Many sources closely following the program and critical of what they see as its inefficiency say EPA should include land-use decisions in the early stages of cleanup work. Deciding on how a site ultimately will be used could save time and money, for instance allowing parties to avoid spending tens of millions to clean to residential standards a site whose only future use will be as an industrial park.

Residents near the site, like state officials, fear the wildlife refuge bill will translate into a less protective cleanup at the Arsenal. "Citizens deserve to have that site cleaned up to the highest level possible," said Beth Gallegos, founder of Citizens Against Contamination, a group closely following cleanup activities at the RMA site. She pleaded with EPA and lawmakers, "Please do not use [the legislation] as a way to clean up the site to a lower standard."

Kevin Blose, deputy program manager for the Army at the RMA site, told lawmakers that making a land-use decision up front, as in the case of the Arsenal, helps in that parties are able to tailor studies thereby saving time and resources.

EPA's site manager at the Arsenal, Connally Mears, said there is still disagreement over the land-use choice but that in general if all parties could agree, making the decision up front could simplify the process.

Hanford cleanup

The Department of Energy estimates the cost of cleanup at its Hanford facility in Washington at $25- to $50-billion, according to DOE's John Wagoner, manager of the department's Richland field office. DOE is taking a "bias-for-action approach" at Hanford, Wagoner said, adding the department is working with EPA on ways to reduce the amount of paperwork attached to every step in the cleanup process. "A large amount of taxpayer dollars are being spent," he said. "We don't want our normal bureaucratic practices to impede our getting this job done."

Asked whether he agreed with a state official's suggestion that Superfund—including federal facility—cleanups be delegated to the states on a site-by-site basis, Wagoner said, "We are interested in a simplification of the process." Declining to comment specifically on whether transferring authority to the states would simplify cleanups, Wagoner said, "problems come

up when there is this interface" between federal and state environmental agencies.

Washington Department of Ecology's David Jansen called on Congress to expand Superfund to allow EPA to fully delegate cleanup work to states on a case-by-case basis. DOE needs to provide additional management personnel for its environmental restoration work, Jansen said, adding it is "imperative" that DOE headquarters delegate to its Richland, WA staff broader authority to make site decisions.

Policy

DRAFT LEAD-IN-SOIL DIRECTIVE SUPPORTS USE OF CONTROVERSIAL UBK MODEL

EPA has used its contentious Uptake/Biokinetic (UBK) model as the basis for a new draft guidance which sets cleanup action levels for lead in soil at 500 parts per million and takes into account various site-specific factors. The draft guidance, which is being circulated both inside and outside the agency, is being criticized by some reviewers "for leaving many questions unanswered," an EPA regional official says.

The directive is aimed at being more flexible, so as to take into account site-specific data, a source attending a July 30 meeting on the directive says. But "the directive does not go far enough as to how to adjust the model. In my mind, even though it appears rational and reasonable for the agency to set more flexible guidelines, it is going to put the onus of the risk assessment on the local people and as I see it will cause a lot of discontentment," the source says.

The draft guidance, Establishing Soil Lead Cleanup Levels at CERCLA sites and RCRA facilities, will replace earlier directives on soil lead cleanup levels, a Region VIII source says. "There are a whole series of policy calls that need to be made using this model and this directive is aimed at smoking those issues out," a headquarters source says. The guidance is intended to clarify earlier directives which suggested the standard for lead in soil cleanups be set at levels between 500 ppm and 1,000 ppm. The suggested level of 500 ppm is to be used as a starting point in conjunction with the agency's UBK, an agency source says. The Uptake/Biokinetic model is a model which attempts to predict the blood lead level in children based on certain assumptions.

According to the guidance, the UBK model should be used at three points throughout the Superfund remedial process: at project scoping, during the remedial investigation, and during the feasibility study. During project scoping, the guidance suggests applying the UBK model in a generic sense to identify a preliminary remediation goal of 500 ppm. During the RI, the guidance recommends using the UBK model for evaluating potential risks to humans from environmental exposures to lead. The guidance says that depending on the nature and history of site contamination, data should be collected to replace appropriate UBK model default values with site-specific information. And during the RI/FS, the UBK model may need to be modified to "reflect improved understanding of site specific characteristics."

While the guidance lays out several issues the use of the model may pose, some sources say it leaves some questions unanswered. One source says that the use of the UBK model in general is an issue the agency needs to further address. One EPA source says that many people are still cautious of the model and question whether or not it is a valid method to determine the risk lead poses at Superfund sites because it is still virtually a new method. Another source says that the guidance is important because "if the agency is going to embrace the UBK model we need to be clear on how to use it."

The UBK model has also been criticized by PRPs for "exaggerating the risk of lead at a Superfund site," says a Region VII attorney. PRPs have used the argument that lead found in the soil is often not bioavailable, or does not pose a threat to the public, and that the UBK model does not take bioavailability into account, the source says. This source says that many times PRPs submit results of blood-lead tests to offset the results of the model. But the attorney says he is not always convinced of the results of the blood-lead tests "especially when there are known high levels of lead at a site and the blood lead tests show low levels of lead. I don't believe that this necessarily means there aren't any risks at the site," he says. Another regional source says he has heard a similar argument from PRPs who say the UBK "model would only be a rationalization for raising the cleanup level at a site." One source says that while the UBK model may need more review, the more contentious issue lies in what kinds of lead are bioavailable.

But while the agency stands behind the use of the model, an EPA source says that "many people still question the science behind the use of the model and it may take some time before all of the kinks are smoothed out." Currently an agency workgroup is looking at the model to see if the "model predicts what it is supposed to predict," the source says.

A final guidance is expected to be issued by the end of the calendar year.

Agency pushes for increased use of innovative technology

EPA SEEKING OUTSIDE ADVICE ON ABSOLUTE COVENANTS NOT-TO-SUE

EPA will soon ask outside parties their opinion on expanding the agency's use of absolute covenants not-to-sue. The move by EPA is part of the agency's plan to increase its use of releasing potentially responsible parties (PRPs) from future liability provided they perform permanent remedies or use innovative technologies.

In the next two months, EPA plans to meet with PRPs, waste treatment groups, contractors who provide treatment technologies and interest groups to discuss whether the granting of covenants would be enough of an incentive for PRPs to use innovative technologies. According to an agency source, "There's been some suggestion in the past that this covenant can be used to increase the use of innovative technologies."

EPA wants to know from outside parties how "viable or achievable" such an agreement would be, an EPA official says.

The move to grant more covenants not-to-sue was initiated by Don Clay, assistant administrator for Solid Waste & Emergency Response, in a Feb. 10 memo to EPA Administrator William Reilly (see *Superfund Report*, March 25, 1992, p.12). Under current Superfund law, the agency has the authority to grant exemption from liability to PRPs. The provision requires that cleanups at the sites result in permanent elimination of risk to public health, welfare and the environment. This means that using innovative technology in a cleanup "would have to eliminate, destroy, or immobilize the hazardous constituents," an EPA source says.

Covenants not-to-sue without reopeners have been granted in the past, particularly for de minimis parties, but they are "not the usual," an EPA official says.

An industry source says "it's about time" the agency starts to grant the covenants because the incentive is strong.

EPA KICKS OFF EFFORT FOR NATIONAL SUPERFUND SOIL CLEANUP GOALS

EPA is drafting the first national standards for cleaning contaminated soil at Superfund sites, starting by focusing on cleanup goals for the 100 top priority chemicals.

EPA sources say the standards are being drafted as part of the president's 90-day review of regulations, and are likely to speed cleanups and limit costs by eliminating repetition of costly risk assessments at each individual site.

A Superfund official says the agency is planning a "two-pronged" strategy for issuing the cleanup standards. The first prong will be a series of cleanup standards to address "direct contact threat" situations -- such as exposed barrels or badly contaminated soil that may be easily accessible to people. The agency will set cleanup levels for the 30 top priority pollutants in residential exposure or industrial exposure scenarios by this fall, an agency source says. Cleanup levels for an additional 70 pollutants will be issued early next year. The 100 pollutants are being chosen on the basis of the frequency they appear at Superfund sites and the extent of data the agency has on risks they pose. This source says the target group includes primarily volatile organic compounds and heavy metals including lead, perchlorethylene and polychlorinated biphenyls (PCBs).

The second prong of the effort will be to write cleanup standards for soil where groundwater contamination is a concern. An EPA source explains that using various modelling techniques, the agency hopes to set the equivalent of maximum contaminant levels stringent enough to prevent contaminants from leaching into groundwater. This effort will be aimed at the same 100 pollutants, but will not likely produce a first round of standards until next spring.

An agency source says the standards will initially be released as guidance to the regions, but may eventually be turned into formal rules.

EPA opened the question of cleanup standards in its 30-day review of the program last October, and has frequently discussed the benefits of setting national standards to reduce the time spent at each site arguing over appropriate cleanup levels.

An industry source says that setting standards could ultimately set caps on the cost of Superfund cleanup, hence diffusing some of the fierce battles over liability for those costs. This source argues that Superfund costs are currently unpredictable, and that industry is afraid to agree to pay for cleanup because there is no apparent limit on what that cleanup may cost. EPA's efforts "could expedite cleanups instead of studies," this source says.

But industry sources also warn that if the agency's standards are too conservative, or do not allow for sufficient site-specific flexibility, they could drive overly protective and extremely costly remedies at sites that do not pose significant risks. One industry source cautions that if the standards merely come out as guidance, regions will ignore them in many situations anyway, and battles over cleanup levels will continue.

WHITE HOUSE SUSPENDS GOVERNMENT-WIDE RISK ASSESSMENT REFORM PLAN

The White House, fearing political fallout during this year's presidential elections, has suspended issuance of a controversial plan to revamp federal risk assessment practices until after November, but reportedly still plans to issue the reforms, according to environmentalists and others closely following developments. The plan would affect risk assessments conducted by all federal agencies, including those by EPA at Superfund sites. (*A summary of the proposal follows on the next page.*)

While details of the proposal have been closely held, a July 2 summary of the White House plan shows that an administration concern centers on reforming risk assessment and management so that dollars spent produce the most efficient risk reductions. The summary also shows that the White House had in mind two review mechanisms, one involving a White House scientific office to review risk assessments and the other involving the Office of Management & Budget to review risk management decisions.

Early this month the White House had been poised to publish an executive order that would have imposed consistency in federal risk assessment practices across all agencies and established its new mechanisms for centralizing risk assessment reviews in the administration. That proposal had been developed over several years, based on a proposal by a group called "Federal Focus," which called for such an executive order. Scientists, as well as state and local governments, had contacted White House officials to express their support for such a plan, arguing that current risk assessment procedures are infused with a conservative slant that results in minuscule risks being calculated as significant. These risk assessments force costly solutions to insignificant problems, according to proponents of the executive order.

But environmentalists and other scientists, while admittedly uncertain about exactly what the White House was proposing to do, raised concerns that the administration was planning major changes driven by the notion that federal risk assessment practices are uniformly overprotective, ignoring instances where risk assessment assumptions are arguably underprotective. In a July 2 letter to Counsel to the President C. Boyden Gray, the Natural Resources Defense Council expressed its concerns that sweeping revisions were in the offing without wide public scrutiny of the plan.

Similarly, in a July 20 letter to Council on Environmental Quality Chairman Michael Deland, University of Oklahoma College of Public Health Dean Bailus Walker strongly opposes an executive order. Walker notes that a committee on which he serves, the National Academy of Sciences committee on risk assessment of hazardous air pollutants, includes a cross-section of scientists involved in addressing issues and problems of current risk assessment methods. The executive order's plan for a central White House risk analysis office would add another "layer of bureaucratic confusion" and open channels for "manipulating the science for ideological reasons," Walker says.

At a July 23 meeting with NRDC, Gray told environmentalists that the White House has decided to put off issuing its executive order because at this time it would be difficult to get a reaction to the plan that is not political, says one environmentalist. They felt that "even if it was reasonable and balanced, it might not get a fair hearing" in the current political climate, this source says. At the meeting, NRDC stressed the need for public input, noting that EPA's mixture and derived from rules, for ten years the keystone of the agency's Resource Conservation & Recovery Act hazardous waste program, was overturned by a court because it had been issued without proper public comment. Because the proposal has been developed behind such tightly closed doors, "suspicion about the underlying motives was all we had to go on," says this environmentalist.

Gray refused to discuss details of the executive order, only noting broadly that the White House feels there is not enough good scientific information in agency risk-related decisions, a view NRDC "would probably disagree with" because some rules take years to issue and receive a huge amount of scientific review, says one environmentalist. NRDC did indicate that "there are problems [with risk assessments]," and that "maybe there's common ground," but the group was unable to come away with a clear idea of "what problems they were trying to address" with the now-sidelined proposal, this source says. This sources stresses, however, that "it's definitely not a dead issue," and comments that the high-level White House attention goes to show that "there are a lot of political dimensions to risk assessments."

EPA's Science Advisory Board at a July 27 Executive Committee meeting also held a special session to discuss the executive order. SAB expressed concerns that scientists would have a chance to examine the plan to ensure that it makes sense, and were also concerned about the proposed mechanisms for central White House review of risk assessments. One member noted, for instance, that OMB review of risk management decisions has served as a roadblock, not a clearinghouse, for EPA rules. Lacking technical expertise, OMB overrides science with policy considerations, and the executive order appears to an intensification of that same process, this member said.

Following is a White House summary of its executive order proposal that has been set aside.

Text of White House Risk Assessment Reform Plan

Draft 7/2/92

Summary of Risk Assessment/Risk Management Order

• The first part of the Order would lay out general principles for agencies to follow in conducting risk analysis and making risk management decisions. These are:

-- Setting priorities for risk analysis and risk management in a way that maximizes net benefits to society -- for example, by tackling first those risks that can be reduced the most in return for each social investment.

-- Separating science and policy by requiring full disclosure of underlying assumptions and methods, and by reserving for risk management such non-scientific policy considerations as "margins of safety."

-- Ensuring efficient risk management so that regulatory policies maximize net benefits to society.

-- Ensuring effective public communication by, for example, presenting a risk assessment for a new food substance in the context of ordinary, everyday dietary risks.

• Second, the Order would set specific principles for the documents agencies issue to report their risk analyses.

-- All risk assessments would be required to disclose fully their underlying data, assumptions, models and inferences, to ensure that risk assessments are scientific and not biased by embedded policy judgments.

-- Hazard assessments would have to articulate and justify their methods for extrapolating "dose-response" relationships, such as from high- to low-doses and from animals to humans.

-- Exposure assessments would have to estimate the likelihood of realistic scenarios of exposure to real populations and disclose any hypothetical maximum exposure assumptions.

-- Risk characterization would have to describe any scientific uncertainties and describe the risk at issue in the context of ordinary, everyday risks.

• Third, the Order would set specific principles for risk management decisions.

-- Agencies would have to submit risk management analyses explaining why their preferred strategy will maximize net benefits to society, compared to all reasonable alternative risk management strategies.

-- Agencies would have to consider any risks created by their risk management strategy, including risks posed to any individual, population, or the environment as a result of (i) substitution of other activities, products or pollutants; (ii) effects on well-being via changes in income; and (iii) implementation of the strategy.

• Fourth, the Order would establish two review mechanisms designed to ensure that these principles are followed.

-- Risk assessments would be reviewed by a scientific office in the White House, with help from agencies with scientific expertise. This review would ensure that risk assessments are based on sound science and full disclosure, and would help bring consistency to risk assessments performed by different federal agencies.

-- Separately, risk management analyses would be reviewed by OMB for policy considerations. To the extent they pertain to regulations and proposed legislation already subject to OMB clearance, they would be reviewed under existing procedures.

• The Order would apply to virtually all agency actions relating to risk analysis and management, including:

-- preparation of risk assessments

-- publication or release of risk assessments, including listing on databases available to the public

-- proposed regulations

-- proposed legislation

-- proposed treaties

-- policies on the exercise of enforcement discretion

Superfund Progress

EPA EXPECTS TO HIT TARGET OF 130 CLEANUPS IN FISCAL YEAR 1992

The Superfund program is on track to meet its target of 130 completed cleanups by the end of fiscal year 1992, which was established in a Dec. 20 memo from EPA Administrator William Reilly, according to an agency source. To date, the agency has completed 104 cleanups and needs an additional 26 to meet its goal. "It looks like we're going to make it," the source says. *(List of completed sites begins on page 28.)*

The memo, directed to the regions, had called for 130 cleanups to be completed by FY92 and 200 cleanups to be finished by FY93 (see *Superfund Report*, Jan. 15, 1992, p.3). When the memo was issued, the agency had completed 63 cleanups. The total number of sites currently on the national priorities list is 1,245.

The Superfund program had added 41 cleanups to its completed list during this fiscal year as of August, according to EPA. Region V, which under the memo was scheduled to complete 18 cleanups—the most of any region—has completed half of those. The region is expected to accomplish 11 more cleanups, a Region V source says.

Of the 41 cleanups added to the list of completions this fiscal year, 20 were termed as "sites completed" and 21 were placed in the "construction completion" category, according to the list. Region IX entered the most "construction completed" cleanups on the list this year with six. Of cleanups entering the completion list this year, Region V had the most "site completed" cleanups with five, according to the list.

The December memo also outlined specific sites for each region expected to be completed by the end of this fiscal year and FY93 for each region. However, substitutions for the sites were allowed if complications at a site arose. An EPA source says that "the lists are amorphous and keep changing."

For EPA to add a site to its list of completed cleanups, the remedy does not have to be finished, according to EPA sources. The agency classifies its completed sites into three categories of cleanups called "construction completed," "site completed," and "deleted sites."

A cleanup may first enter the completed list under the category of "construction completed" after a preliminary close-out report is written for the site cleanup, according to another EPA source. A preliminary close-out report says that construction is considered complete as long as the minor items that did not meet preliminary inspection standards are fixed, the source says. Another point at which a site may enter the "construction completed" category is when an interim close-out report is issued, which says that construction is complete at a site, but the remedy is not finished because a long-term response action is required, like a groundwater cleanup expected to take 10 to 20 years, she says.

When all remedial action goals are met at a site, a cleanup moves into the "site completed" category, according to the source. When a remedy is finished, EPA writes a close-out report. A site then enters the "deleted sites" category when it is removed from the national priorities list, the source says. Non-action records-of-decision (RODs) are also included on the completed list, another EPA source says. Many non-action RODs result from removal actions, he says. A close-out report is not written for those sites.

Federal Facilities

CITY IN KANSAS TRYING TO LINK NAVY TO CONTAMINATION AT MUNICIPAL SITE

A Kansas town, facing cleanup costs at a local landfill, says the U.S. Navy is responsible for most of the hazardous waste at the site and local officials are poring through World War II records in an effort to prove it. With letters to EPA and the Navy, a member of Congress has joined in the effort to determine the extent of the Navy's responsiblity at the municipal Superfund site.

The city last spring even hosted a reunion of Naval officers stationed at an air base in the area during the 1940s and 1950s to try to glean information from them about what the Navy did with its waste.

Hutchinson, KS is on the hook for cleanup costs at a city-owned site which the Navy leased during WWII for use as a naval air base. The city believes naval operations in the vicinity of the site contributed to the contamination, and say they want the Navy to assume their share of responsibility for cleaning it up.

A sticking point in the investigation is the lack of data on the Navy's operations and waste disposal activities at the time. The U.S. was engaged in the largest military buildup in history and "keeping good records was probably not the highest priority," a city official says.

EPA sources say while it is clear that the Navy operated an air station in the area, EPA has no specific records on the Navy's waste-handling practices at the time. The agency has repeatedly requested specific information from the

Navy, but to no avail.

Rep. Pat Roberts (R-KS), on behalf of Hutchinson, last month wrote to the Navy to request service manuals of circa 1940 aircraft that were used at the facility. The manuals will tell what kinds of fuels and lubricants were used with these aircraft, and the city will be able to determine whether they match substances found at the site, the city official says. In a July 21 response, the Navy's deputy director for Naval History told Roberts that manuals for pre-1960 naval aircraft are held at the National Archives. Roberts then sent a letter of request to the Archives.

The Obee Road site, which is on a municipal airport, was first acquired by Hutchinson in 1928. The Navy took control of the site in 1942. The Navy in 1943 constructed an airbase south of the city and used the municipal airport site as one of 20 satellite bases. At the close of WWII, the airport was returned to the city, and the nearby air station was closed. In the early 1950s, however, the Navy recommissioned the air station south of the city, and during the same year a county landfill on the western fringe of the municipal airport began operations. The landfill remained open until late 1968, and according to the official was the only waste disposal landfill in the county.

"We don't know what [the Navy] did with its waste," he says, but the strong suspicion is that most of it ended up in the landfill that is now on the national priorities list.

In response to a 1987 request for information from EPA, the Navy told the agency it did not have information concerning purchase orders, receipts, manifests, requisitions or inventories for supplies and materials that may have contained hazardous substances. "In addition, we did not find any information concerning operation logs, maintenance and repair logs, records of fuel deliveries, records of fuel usage, and waste disposal practices."

According to an investigation by the Army Corps of Engineers, which is charged with examining Defense Department responsibility for cleanup of former properties, "there is no evidence of unsafe conditions resulting from DOD use" at the site.

But Hutchinson is continuing its efforts to link the Navy to the site contamination. The city is gathering information on the naval air base operations and submitting it to EPA, according to a local official. EPA will follow any lead the city provides, an EPA Region VII source says.

In a June 10 letter to EPA Region VII Administrator Morris Kay, Roberts requests the agency's assistance in getting the Navy to cooperate. "If the Department of Defense is responsible for some of the contamination then they should face up to that responsibility," Roberts says. A Roberts staffer spoke with Kay last week, and Kay seemed receptive to the city's concerns and willing to help, the staffer said. Roberts to date has not received a response to the June 10 letter.

Disputing Air Force's force majeure defense

EPA MAINTAINS THREAT AGAINST AIR FORCE FOR CLEANUP DELAYS

EPA is set to fine the U.S. Air Force for failing to meet a cleanup agreement at a California base, denying the Air Force's claims that a provision in the federal facilities agreement bars it from being penalized for a cleanup delay due to a lack of funding.

At issue is the cleanup at Castle Air Force Base in California where the Defense Department, EPA and the California state EPA have been engaged in a dispute resolution over the delayed work. DOD says its cleanup account was shorted in last year's budget process and was therefore left without funding for the work. And although the Air Force recently notified EPA that, after rearranging funding for other projects it now has $360,000 to complete some of the site investigation work, EPA says the project has fallen too far behind and the agency is ready to move forward with the penalties unless cleanup plans are submitted.

EPA Region IX Administrator Daniel McGovern in a July 22 letter to Assistant Secretary of the Air Force Gary Vest, while expressing gratitude that the Air Force has found funds to complete a portion of the project, says the funding was found only after several months of delay. In addition, McGovern says the workplans for cleanup have not been submitted and the Air Force has yet to commit to a new schedule for submittal of these documents. The Air Force "indeed has indicated that funds may still run out for these and other Castle projects," McGovern says.

McGovern says the agency does not accept the Air Force's claim that the force majeure provision in the federal facilities agreement bars it from being penalized for its delay in cleaning up the base. "After considerable review of the record . . . I have concluded that the Air Force's claim of force majeure is not justified," he says. McGovern further says he plans to issue stipulated penalties for the Air Force's failure to submit the workplans on a timely basis as laid out in the federal facilities agreement. The penalties will continue to accrue until the documents are submitted, he says.

The letter says that under the rules of the federal facilities agreement, McGovern is now obligated to issue a written position on the dispute which the Air Force will have 14 days from the time of the letter to elevate the dispute to EPA Administrator William Reilly. "Failure to elevate the dispute within the escalation period is deemed agreement with my written position on the dispute," McGovern says.

The Air Force responded to the agency's letter July 28, saying the agency has not provided any legal basis for the claims, according to an Air Force source. "We have provided

the agency with the facts which they just don't want to accept," the source says adding, "These are circumstances beyond our control which are tied to funding. The money just isn't there." This source points to the Air Force's efforts to obtain further funding, making it possible to at least complete the workplans for the remedial investigation/feasibility study, the source says. "The next shot of money that we'll need to actually complete the RI/FS work is due in October."

Castle Air Force Base, located in Atwater, CA, is included on the Department of Defense's Round II list of closing bases. Castle is currently scheduled to close in May 1995. The cleanup of the base is divided into four operable units and an interim record of decision was signed for the first operable unit in August 1991. Castle Air Force base invoked the dispute resolution provision of the federal facilities agreement in response to EPA's intent to assess penalties for failing to summit the draft workplan for the overall base remedial investigation/feasibility study and for the late submittal of the draft final workplan for operable unit 3. EPA says a delay in funding would affect all operable units.

INTERAGENCY GROUP TARGETS PARTICIPATION IN FEDERAL FACILITY CLEANUPS

An interagency group of federal officials has begun a process that it hopes will increase public involvement in cleanups at federal facility sites across the country and ultimately reduce the time and money spent developing cleanup strategies. The group is developing a number of recommendations, which are expected to culminate in a report at the end of this year, an EPA official says.

The Federal Facilities Restoration Dialogue Committee was established in March 1992 to deal with prioritization issues at federal facility sites, an EPA source says. However after the group was established it became apparent that it would also have to address public participation at federal sites and determine how the public interfaces with the government and how the process can be improved, the source says. As a result two sub-groups within the committee have been formed to address two main issues: establishing participation at the local level and defining a role for the public in cost estimating decisions.

A draft document compiled by workgroup I and issued at a July 21 meeting lays out the group's recommendations for improving the site level decision-making process for cleaning up federal sites. The group's recommendations fall into two categories: exchanging information and soliciting input and advice, the report says. The first section "looks at methods for improving the current processes for exchanging information with interested stakeholders" and is intended to improve two-way communication to promote "an awareness of activities occurring at the site and an awareness of the concerns of those affected by these activities," the report says. The second section recommends an improved process for generating input from interested parties to improve the decision-making process by obtaining advice from those most directly affected by the cleanup activities.

One of the key recommendations for improving the current process of exchanging information is to establish site-specific advisory boards (SSAB). In the document the group recommends a model for agencies to consider implementing this idea. The document says it is the workgroup's intention that this model will serve as a basis for developing SSABs for those agencies that do not currently have such mechanisms.

The document also recommends developing specific policies for delineating the process and timetables for disseminating information. According to the workgroup at a minimum these policies should include: making draft environmental restoration documents available to EPA and state regulators, identifying and declassifying documents that are relevant to environmental restoration efforts, and promoting early dissemination of information. The workgroup says to ensure the effective implementation of these policies, the agencies should establish in conjunction with EPA, pilot programs for appointing Information Access Officers. The report suggests that the officers be advocates for public access to information and be responsible for investigating problems of access to specific information.

Workgroup II is also preparing a report containing recommendations related to the exchange of information among key stakeholders at critical stages of the decision-making process. There are four main points to the workgroup's draft proposal. Three of the four points involve different steps in the annual cycle of decision-making and priority setting that takes place in the context of the federal budget cycle, the document says. The goal of the group as it worked on the draft document was to identify a process demonstrating a competent approach to the "wise use of environmental restoration resources that will instill congressional and public confidence in the management of the program," the document says. According to an EPA source there are some sticking points within the draft documents over what role the public should play in the budget process. A DOD source says overall the group will have contributed to a positive change by proposing different approaches for involving the public at federal facilities.

Participants in the dialogue include public interest and environmental groups, tribal governments and Native American representatives, state government officials, federal agency representatives, and other interested and affected parties.

Changing Superfund

EPA TO ISSUE DRAFT FACT SHEETS ON TECHNOLOGY OPTIONS FOR SUPERFUND SITES

Draft fact sheets which will list two or three cleanup technology options for Superfund sites are expected to be sent to the regions by the end of this year, with the first fact sheet, for municipal landfills, scheduled for October, according to an agency source. The draft fact sheets, which are the next step in the presumptive remedies initiative, will outline possible technologies for remediation at four site types defined by a site's characteristics, the source says.

The presumptive remedy initiative announced last fall under the 30-day study is expected to save time in Superfund cleanups by taking into account past site experience, an agency source says. The initiative is one of the issues the agency will focus on in the coming fiscal year, according to Don Clay, assistant administrator for Solid Waste & Emergency Response (*see related story*).

The initiative in part was designed to help streamline cleanups by cutting down on the time and effort required to complete a feasibility study. The new approach will whenever possible identify remedies that have been selected for certain site types and establish categories of remedies so the agency will not have to reinvent the wheel at every site, an agency source says. The four site types the agency has chosen to test the initiative are: sites contaminated with solvents, sites contaminated with woodtreating chemicals, municipal landfills, and contaminated groundwater sites. A separate initiative for groundwater sites is underway and fact sheets for remedies will not be issued, the source says.

The draft fact sheets will list technology selections which may be appropriate for a site depending on site contaminants. The project manager will then be able to screen each technology to determine which would be the most appropriate for the site. The technologies listed for each site will be technologies that have been tested and proven by the agency, the source says. "We are not saying don't use innovative technologies to clean up a site, rather here is the tool box of technologies that have been proven effective for this site type." If the draft fact sheets prove successful the agency may then issue guidance based on the sheets, the source says. The next step would be to place a notice in the *Federal Register* formalizing the agency's position on the use of these remedies.

In addition to cutting time in the feasibility study stage, the use of presumptive remedies will expedite the remedial design stage in which the agency gathers information to determine whether the technology will work. The presumptive remedies program will have already determined that a technology will work for sites with certain chemical and physical characteristics, the source says.

The source says work has begun on all of the fact sheets and expects a sheet on municipal landfills will be the first out of the blocks with a scheduled release date of October. Fact sheets for solvent and woodtreating sites are due out in December.

In July, EPA announced that the focus of the presumptive remedy initiative had changed. When the approach was first announced, high-level Superfund officials envisioned that one remedy would be chosen for the specific site type. Once the agency began working on the project, it became clear that this just was not possible, an agency source says. This source says EPA staff presented their initial findings to Superfund officials who then agreed to adjust the approach to finding two or three technologies which would be viable alternatives. EPA has formed four workgroups, consisting of both regional and headquarters officials, to compile records of decision and other data on each site type, according to an agency source. The workgroups' findings will be the basis for the agency's decisions on the best remedies for each site type.

REGIONS TEST WAYS TO SPEED SUPERFUND CLEANUP PROCESS

The Superfund Accelerated Cleanup Model (SACM), the agency's most recent plan for speeding cleanups, was introduced in February. The new model integrates elements of the site assessment, and removal and remedial phases of cleanup. Since that time regions have been asked by headquarters to establish pilot projects to test ways to expedite the Superfund process. Below are several pilots which are currently underway.

Region V

A pilot project scheduled for Region V will test a team approach for the site screening and assessment phases of cleanup, according to a Region V source. The approach is intended to speed the cleanup process by combining the sampling needs of the various program elements such as the removal and remedial programs, according to the source. Region V hopes to work as a team in identifying early on non-NPL sites and in testing the efficiency of the Superfund Accelerated Cleanup Model using these sites. The source says the agency currently has four candidate sites, however funding has not yet been approved.

Region VI

In Region VI, pilot studies are underway at three Superfund sites in which site investigations and sampling were merged and condensed in the remedial investigation and feasibility study stages to speed up the Superfund process, a Region VI official says. The shortened RI/FS cuts down on the sampling and technical work by one-third, according to the region official.

"We are making an erstwhile attempt to streamline the

process, making sure we don't sacrifice quality for speed," the official says.

The pilots, which fall under the Lightning ROD program, are based on principles from the Superfund Accelerated Cleanup Model (SACM)—established to speed up the Superfund process, the official says. "We need to take something like the kind of approach we do when we conduct emergency cleanups and that will go a long way to speeding up the Superfund process," he says.

For two of the sites, the American Creosote Works site and the Popile site, it took roughly six months from the time the sites were proposed for the national priorities list to the time proposed plans for remedies were developed, a Region VI source says. The third site, unlike the other two is a potentially responsible party (PRP)-led site and therefore may not proceed as quickly because PRPs are given certain time frames to work within, according to a Region VI official. The official says he hopes the timeframe for each phase within the Superfund program can be cut by one-third. The region is aiming to cut that time down from the standard six to eight years it takes to clean up a site today to the one to three-year time period the Superfund program had originally established as a goal for each site, he says.

Another pilot study at a Region VI Superfund site will begin after a removal action is completed, the Region VI official says. At the National Zinc at Bartlesville site in Oklahoma, located at a former lead smelter operations, EPA plans to use already available information such as sampling data to accelerate the Superfund process, the official says. Twenty-nine areas close to the site are targeted for cleanup in the removal action, which is expected to take six months and cost $5.5-million, he says.

Region VII

A pilot project in Region VII is proposing to develop standard cleanup goals and remedy types for grain storage sites, PCB sites, and coal gasification sites. A source in Region VII says the agency has formed workgroups for each of the site types made up of experienced regional project managers. The groups will begin studying the site types by setting scenarios and combining levels of contamination with the certain types of media. The source says he believes the region will come up with a number of options for remedies for each site type rather than just one option and that while saving time may be one advantage to using standard cleanup goals, consistency within the program is also a priority for this project.

Region VIII

At a South Dakota site proposed for the national priorities list, EPA has begun using both Superfund and Clean Water Act authorities in a pilot project aimed at accelerating cleanups, with potential applicability at other sites. A speedy cleanup has been proposed for a number of reasons: the potentially responsible party's cooperation and desire for an expedited cleanup, the water authority's desire to begin water monitoring during the heavy spring run-off season, and the region's limited amount of resources for new Superfund sites, according to EPA sources. The pilot study also includes an ecological study, which is looking at the effects of contaminants on aquatic and biological life near the site, according to an EPA source.

Superfund guidelines will be followed at the site, but the water authority will be used as the legal mechanism to drive the site cleanup, according to an EPA source. Neither a Superfund nor a water authority order has been issued at the site, the source says. If a Superfund enforcement order had been issued, negotiations would have taken two to three months, the source says. Following negotiations, EPA generally spends about three months preparing to do the work, she says. Instead, a workplan was developed at the site in about two months, she says.

"There are no differences in terms of data collections, solutions or anything else," a water authority source says. Both Superfund and water authorities are monitoring the cleanup, however, the PRP will not be charged for the water authority's work, which is expected to save the PRP hundreds of thousands of dollars, the source says.

The PRP, a mining company, is cooperating with EPA in the cleanup, a PRP source says. The company is the present owner of land that had been contaminated by a mining operations starting in the early part of the century. The source says EPA's use of both water and Superfund authority may expedite the cleanup or it may "muddy the waters" further.

Also in Region VIII, a pilot study is on track that accelerates five fiscal year 1993 completions. Four of the five cleanups are even expected to be complete ahead of the accelerated schedule, an EPA Region VIII source says. One site, the Whitewood Creek site in South Dakota is nearly a year ahead of schedule, while the Arsenic Trioxide site in North Dakota is set to be complete by the end of this fiscal year.

The pilot also includes five additional sites that have a possibility of being completed by FY93, the source says.

Region IX

A pilot study in Region IX is focusing on determining what information is redundant in site and remedial investigations in an effort to streamline the two. The pilot stems from the Superfund Accelerated Cleanup Model that merges the removal and remedial programs to speed cleanups. The region will be looking at what information needs to be collected during an initial investigation to satisfy the needs of the standard remedial, removal and site assessment investigations. "It's going to be very lean and cost-effective," a Region IX says.

EPA plans to use a team involving staff from the site assessment program, remedial program and EPA headquarters to brainstorm about what needs to go into an initial investigation at a proposed Superfund site, according to a Region IX source. In the study, EPA will determine the amount of time it will take for an initial investigation, whether the costs are more than expected and whether the lengthier investigation can be completed in a reasonable amount of time, the source says. Once a statement of work outlining the information that needs to be collected in an initial investigation is established, Region IX will test the proposed investigation process at 30 sites, the source says.

Reviewing Superfund

SCIENCE ADVISORY BOARD TO REVIEW OHIO SUPERFUND SITE AS PILOT CASE

In an unusual move, EPA's Science Advisory Board (SAB) has agreed to review an Ohio Superfund site to investigate questions about the credibility of agency work at the site. An agency source says the board agreed to review the site as a pilot case to see if circumstances warrant a review by the board. The review is intended to pave the way for similar reviews, the source says.

"We are reviewing this site as a test case, looking at the science behind the sampling and monitoring" which was conducted by the agency, an SAB source says. The board in looking at the case as a pilot will be assessing whether or not SAB should generically be reviewing certain sites, he says. Another member of the board says the Radiation Avisory Committee originally refused the Superfund office's request, however, interest by individual members requested that the board reconsider its decision. The source says the board is in the process of putting together a committee which will look at the site and the "generic issue of how do you sample contaminants at Superfund sites."

At a July 27 executive board meeting, National Superfund Director Rich Guimond and Superfund Revitalization Office head Tim Fields brought to the board's attention the Industrial Excess Landfill Superfund site in Uniontown, OH where citizens last year charged that Region V officials curtailed a field investigation in order to avoid uncovering information regarding the contamination at the site. The citizens charge there is radiological contamination at the site and last year called for a headquarters takeover after the region allegedly botched a series of contamination tests.

The citizens group, Concerned Citizens of Lake Township, and a public interest group, Clean Water Action, also requested changes in management, organization, testing and analyses at the site and requested an independent study. Clean Sites, Inc. prepared a study recommending to EPA several options to improve relations with the community (see *Superfund Report* April 8, 1992, p. 19).

According to an EPA official, "the public credibility issues and past data analyses need to be examined" by an outside source. "We need to make sure EPA's science is valid and that it is something the people can trust," he says. This source says EPA's review will probably last one year and include up to three public meetings. The source says the board is currently forming a special 10-member committee to look at the site, but is still working out the details of the review. What we are looking for is a "resolution of certain issues at the site and whether or not future reviews by the board are feasible," he says.

CLEAN SITES CASE STUDIES SHOW MEDIATION SAVES MONEY, BUT NOT TIME

The use of mediation at Superfund sites may save money but not time, a recent report compiling six case studies concludes. Several parties who participated in the case studies believed that mediation saved money in negotiating and helped to avoid litigation costs, but there was no consensus that mediation saved time; rather, the use of mediation just resolved a dispute that people doubted would have been resolved at all, the report says.

The study, *Superfund Enforcement Mediation Case Studies*, was prepared by Clean Sites, Inc., a non-profit organization which provides mediation, facilitation, and arbitration services for Superfund cleanups, and was conducted by RESOLVE, an independent dispute resolution program of the World Wildlife Fund. The mediations focused on six sites and two statutes—the Comprehensive Environmental Response Compensation & Liability Act (CERCLA) and the Safe Drinking Water Act (SDWA). Four of the cases were among EPA and one or more parties subject to enforcement action; two were among potentially responsible parties in Superfund cases. All of the meditations resulted in settlement of the government's claim and two also resulted in agreements to voluntarily extend the environmental action relating to the claim, the study says.

The information provided by the case studies are intended to "be a good learning tool" for regional attorneys, according to a source with Clean Sites. The report makes some general conclusions based on the perceptions of the people involved in the mediations, the source says. Several of the parties believed that the use of mediation reduced the transaction costs at the site. The source also says "PRPs place a high value on avoiding litigation costs."

The most prevalent reason given by EPA participants for using mediation was "to avoid the expected excessive

administrative cost to the government," according to the report. In some cases EPA perceived it would have to spend a lot of time educating the parties regarding liability under the law. Parties facing enforcement actions by EPA were willing to try mediation in order to try and reopen negotiations that had reached an impasse and to maintain ongoing relations with other companies.

A source with RESOLVE points to the Spectra-Chem, Inc site as a case which shows how well mediation worked. In this case there was a single PRP who, essentially, was not familiar with how Superfund worked, the source says. "Here it is clear that the agency would not have been able to settle if it had not been for the help of the mediator." The source says that each case is unique in its own way and demonstrates the effectiveness of mediation. "It allows the parties to look at things in a different light. It's effective and it works," he says.

The six cases studied by Clean Sites are: the Pollution Abatement Services case, the Sheridan case, the Spectra-Chem, Inc. case, Republic Hose case, E.H. Schilling landfill case and Greiners Lagoon case.

Municipal Liability

KANSAS TOWN PLANS MEETING OF OWNER/OPERATOR CITIES TO DISCUSS OPTIONS

Local officials in a Kansas town, increasingly frustrated over the status of owner/operator municipalities facing Superfund cleanups, have launched an effort to garner other cities' support for changes to Superfund law. Hutchinson, KS officials hope to host a meeting this fall where fellow owner/operator cities can discuss ways to highlight the issue during the upcoming reauthorization debate.

While efforts are underway at EPA and in Congress to relieve local governments facing Superfund liability, owner/operator cities cannot count on any relief under the current initiatives. Pending administrative and legislative measures apply only to generators and transporters of municipal trash, meaning cities that have owned or operated now-contaminated landfills are left holding the bag. Owner/operator municipalities, these cities argue, face the same financial constraints as other municipalities and therefore should enjoy some protection from Superfund.

"Congress must be made aware of the threats Superfund poses to local governments and taxpayers," says Joe Palacioz, city manager of Hutchinson in a July 30 letter to scores of local governments nationwide. In the letter Palacioz invites local officials to a meeting in Hutchinson this fall to discuss options for "reducing municipal vulnerability to Superfund mandates." Hutchinson, facing liability as an owner/operator of a landfill now on the national priorities list, supports legislation that would place a cap on liability for municipal potentially responsible parties (PRPs).

EPA's response to municipalities facing Superfund problems to date has been "insufficient," the letter charges, adding that the agency fails to recognize the distinction between local governments and "private, for-profit corporations." The net result of EPA's policy is "a continued perception of cities as having deep pockets and the possibility that municipal treasuries will be depleted, forcing local tax increases, service reductions or both," the letter states.

EPA names as PRPs cities that have owned or operated contaminated landfills. The agency's pending allocation guidelines for city landfills will apply only to generators and transporters, though agency sources have said they will look at the owner/operator issue.

Local officials in Saco, ME are also laying the groundwork for a lobbying effort for owner/operator municipalities during reauthorization. Saco's city administrator has brought the matter to the attention of Sen. William Cohen (R-ME) and other Congress members and hopes to see proposed legislation to aid owner/operators early in the next congressional session.

Hutchinson and other owner/operator cities are "generally supportive" of the efforts of American Communities for Cleanup Equity (ACCE), a coalition lobbying for legislation to protect generators and transporters of municipal waste from Superfund lawsuits. But cities facing owner/operator liability have long complained that ACCE does not go far enough. Efforts to lessen Superfund's impact on municipalities must focus on more than generator/transporter liability "to be of any real benefit to local governments," Palacioz states. While ACCE sympathizes with owner/operator cities, the group fears that the political pressure against removing this class of PRPs from liability would foil their efforts to protect cities from industrial polluters' lawsuits, ACCE sources say.

RULE BY RULE PROGRESS REPORT

Status reports indicate update since last issue

The Superfund Amendments & Reauthorization Act of 1986 requires EPA, the Interior Dept., the Occupational Safety and Health Administration and the Transportation Dept. to promulgate a series of regulations to implement the law. Superfund Report, in every issue, provides a capsule status report on the major rules. Status descriptions in bold indicate new activity since the last issue.

DESIGNATING HAZARDOUS SUBSTANCES - Proposed rule will designate extremely hazardous substances, as defined in SARA section 302 and published in the Federal Register (54 FR 3388). **Contact:** Barbara Hostage (202-260-2198)
Status: Proposed rule approved by OMB. EPA public comment period closed March 23, 1989. OMB has returned the rule to EPA for reconsideration charging that the rule created an unnecessary burden on industry. All further action is on hold for President Bush's moratorium on rule-making. EPA officials have not decided how they will respond to the OMB criticism following the temporary hold.

EXTREMELY HAZARDOUS SUBSTANCES: RQs - Adjustment of reportable quantities for extremely hazardous substances that EPA has proposed to designate as hazardous under CERCLA section 102. **Contact:** Barbara Hostage (202-260-2198)
Status: Proposed rule published in Federal Register Aug. 30, 1989. Public comment period closed Oct. 30, 1989. OMB has returned the rule to EPA for reconsideration, and EPA officials said they have not yet plotted their response, though the rule is on hold for the president's moratorium.

CONTRACTOR INDEMNIFICATION - Guidelines would set standards on indemnification of response action contractors from Superfund liability, under SARA section 119.
Contact: Benjamin Hamm (202) 260-980 **Status:** After a final review by Administrator Reilly to check for the guidelines' potential drag on the pace of cleanups, the agency has released the guidelines to the Office of Management & Budget for review. **A cost analysis is currently being conducted by EPA's Office of Policy, Planning and Evaluation.**

OFF-SITE RESPONSE ACTIONS - Rule interprets and codifies procedures that must be followed when a response action under CERCLA involves off-site transfer of CERCLA waste under SARA section 121 (d)(3). **Contact:** Ken Gigliello (202-260-9320)
Status: OMB returned the rule to EPA unsigned, and the rule is now on hold, although an agency source said EPA is weighing whether to try again to issue the rule.

RESPONSE COSTS & CLAIMS - SARA sections 111(a) and (o) and 112, respectively, authorize payment of claims and require EPA to make public the limitations on claims payments for response costs and issue regulations for filing claims against Superfund sites. **Contact:** Bill Ross or Denise Ergener (703-308-8339)
Status: Proposed rule was published in Federal Register Sept, 13, 1989. Comment period closed Nov. 13. **OMB approved the rule mid-June and the measure is expected to be published in the *Federal Register* in August.**

RESOURCE DAMAGES - Dept. of Interior damage assessment regulations for natural resource damage claims under CERCLA 107 and 301 will be revised to conform with a court ruling remanding the rules for revision. **Contact:** Dave Rosenberger (202-208-3301)
Status: Proposed rule for type B regulations published in Federal Register April 29, 1991. Public comment period ended July 17, 1991. DOI is reviewing comments and is unsure when it will reissue the rule. The Dept is also weighing whether to reopen public comment on how to assign value to resources not currently being used by human beings.

COST RECOVERY - Rule under development to promote standardization of EPA cost recovery procedures under CERCLA 107 (a). Regulation recommended by Management Review. **Contact:** Frank Biros (703-308-8635)
Status: Rule was sent to OMB March 8 and was withdrawn by EPA for further review Aug. 23, 1991. EPA resubmitted the rule to OMB, November 25. **The agency issued the proposed rule for comment July 29.**

LENDER LIABILITY - EPA rule clarifyies when secured lenders may be held liable for Superfund cleanup costs. **Contact:** John Fogerty (202-260-8865)
Status: Proposed rule released by EPA on June 5, 1991. Rule published in the Federal Register June 24, 1991, Vol. 56, no. 121, p. 28798. Public comment period ended July 24, 1991. EPA released the rule April 24, and the final rule was published in the *Federal Register* April 29. **The Chemical Manufacturers Association and the Michigan Attorney General's Office have asked the District of Columbia Appeals Court to review the rule. Statements of issues are due at the end of the month.**

TECHNICAL ASSISTANCE GRANTS - Rule would set out regulations for citizens groups applying for technical assistance grants of up to $50,000 at NPL sites. **Contact:** Melissa Shapiro (703-308-8340)
Status: Proposed interim final rule published in the Federal Register, March 24, 1988. Revised interim final rule proposed Dec. 1, 1989. **The final rule was cleared by OMB on June 18 and now awaits EPA approval.**

Lender Liability

MICHIGAN, CHEMICAL INDUSTRY GROUP SEEK REVIEW OF LENDER LIABILITY RULE

The Michigan Attorney General's office and the Chemical Manufacturers Association asked a federal appeals court July 28 to review EPA's lender liability rule issued in April. Banking industry sources are decrying the move saying the suit "may negate what the rule has been able to do."

The agency April 24 released a final rule which would exempt lenders from Superfund liability when they foreclose on a contaminated property. The rule expands the secured creditor exemption currently found in Superfund law. The rule, although basically seen as an improvement over earlier drafts, was criticized by reviewers for not including a provision requiring mandatory environmental audits. Some sources cited a lack of incentive to perform the audits as a result of the provision being cut from the rule. And other sources said the rule provided an unfair exemption for lenders with one source saying that it is a "time of exempting politically powerful groups."

According to an EPA source, the agency was notified only one day prior to the filing of the petitions but he says the challenge to the rule was not unexpected. The source says he believes "the rule is basically defensible" and says there is not "a whole lot of chance that the rule will be struck down." The agency source points to the fact that a stay in the rule was not requested therefore the rule will not be deemed ineffective throughout the review process. The petitions were filed with the U.S. Court of Appeals for the D.C. Circuit.

A banking industry source says he fears the challenge will push "those [lenders] on the fence back to the table" negating all the good work of the rule. This source says he was beginning to see a slight change in the lending industry but that he now fears the lending industry will recoil and return to the non-lending days. One banking industry source fears the move could push lenders that were beginning to feel comfortable with their lending practices back to "where they were before the rule was published."

At press time statements of issues had not been filed with the court. An attorney with CMA says the rule has some substantive problems, but was reluctant to give specifics on the issues. One CMA source says the issues may follow comments the group filed on the proposed rule. In comments submitted July 24, 1991, CMA says it does not oppose "efforts by EPA to clarify CERCLA's security interest exemption, provided that they are environmentally protective and do not expand the scope of the exemption. Regrettably the proposed rule goes far beyond the scope of the security interest exemption." Specifically, CMA says the proposed rule would improperly shift the burden of proof to the plaintiff in any case where a defendant invoked the security interest exemption and that removing the provision which required lenders to perform environmental audits before making the loans would take away lenders' incentive to perform the audits.

Similar concerns are being expressed by Michigan's Attorney General. According to a source with the AG's office, one of the key sticking points with the rule is that EPA has deleted the mandatory environmental audits. "This creates an incentive for lenders to foreclose and be able to manage the facility. We believe this is creating incentives that Congress never intended," the source says. "The attorney general is not against clarifying language in the statute, but this rule goes way beyond clarification." The source says the AG is also concerned over the extent to which the rule would override the Fleet Factors case and says the statement of issues will raise other substantive problems. In the Fleet case a U.S. appeals court ruled that a secured creditor could be held liable for Superfund contamination at a borrower's facility if the lender had the capacity to influence the borrower's decisions on hazardous waste. Petitions for rehearing were denied and the case was remanded to the district court. The case was reactivated June 15.

A briefing period to review the rule has not yet been set and statements of issues are due at the end of the month, the agency source says.

Litigation

COUNTY NOT COVERED FOR DISCHARGE OF LEACHATE, APPEALS COURT RULES

A Delaware county is not entitled to insurance coverage for contamination arising from the discharge of leachate from its landfill, even if the county was unaware that the leachate was a hazardous substance, a U.S. appeals court ruled July 28. The ruling brings to a close a seven-year legal battle over whether New Castle County, DE may recover environmental cleanup costs from one of its major insurers, Continental Casualty Company.

Reversing a lower court decision, the U.S. Court of Appeals for the 3rd Circuit rejected New Castle's argument that the pollution exclusion clause bars coverage only if a policyholder knew at the time of discharge that the material is hazardous. "Knowledge of the nature of the substance discharged is irrelevant," the court said. The case marks the first time a federal appeals court has ruled on the so-called "known-contaminant theory," by which policyholders argue that coverage is barred only if a party knew the substance it released was a contaminant at the time of release. The court disagreed. "The 'known-contaminant' theory is simply wrong," the court said. "The insurance policy nowhere hints that the term 'contaminants' carries with it a scienter element."

The theory represents yet another point of dispute between policyholders and insurance carriers in the seemingly intractable battle over the interpretation of the pollution exclusion.

The court was predicting how Delaware's highest court would rule, as that court has yet to address the pollution exclusion issue.

Under the exclusion, contained in most liability policies since the 1970s, liability arising from the discharge of contaminants is not covered unless that discharge is "sudden and accidental." At issue was whether the term "contaminants" can be construed to contain a scienter element, that is, so that the clause bars coverage only if the insured party discharges what is known to be a contaminant.

The district court had ruled in favor of coverage for New Castle, stating that while the County expected the discharge of leachate from the landfill, the pollution exclusion did not apply because the County did not know at the time that leachate was hazardous. Based on the best available information at the time, the county did not know the leachate was hazardous, therefore it did not expect or intend to pollute, the district court said.

The 3rd Circuit rejected this reasoning, saying there is no "principled method" to attach a scienter element to some terms in the clause and not to others. "We refuse to contort the pollution exclusion clause to require every element of the . . . clause to carry an implied scienter element because the drafter chose to write the policy in plain English rather than qualify every term ad infinitum."

A policyholder attorney charges that the 3rd Circuit failed to abide by, much less acknowledge, a Delaware Superior Court ruling last January, which found in favor of policyholders on the issue— in a case involving the same site. The Delaware court adopted the reasoning the district court followed in the New Castle case, holding that a party is entitled to coverage if it did not know at the time it discharged waste that the waste was hazardous, according to the attorney. At press time, New Castle was considering appealing for a rehearing; it had until Aug. 11 to do so, the attorney says.

The 3rd Circuit ruling reinforces that courts "will not tolerate policyholders' attempts to create ambiguity in plain insurance policy language for the purpose of expanding coverage," according to a statement from the Insurance Environmental Litigation Association, which filed an amicus brief on behalf of insurers in the case.

The case centers on New Castle County's liability at the Tybouts Corner Landfill Superfund site, which began receiving waste in 1969. Contamination was discovered at the site in 1971, shortly after the landfill stopped receiving waste. EPA sued the county in 1980 under Superfund law and the Resource Conservation & Recovery Act. The county settled with EPA, and turned to 12 of its insurers for coverage. All carriers except Continental settled.

In 1989 a federal district court ruled that environmental costs are covered "damages," and "sudden and accidental" in the pollution exclusion is ambiguous and must be construed in favor of the policyholder. On appeal, the 3rd Circuit upheld the district court's ruling and remanded the case to the district court to determine whether the county expected or intended to discharge contaminants. The lower court said while New Castle knew of the discharge, it did not know the material being discharged was a contaminant. Continental once again appealed to the 3rd Circuit (*New Castle County v. Hartford Accident and Indemnity Company, et al.*, United States Court of Appeals for the 3rd Circuit, No. 91-3857, July 28, 1992).

Limits on nuisance claim established

COURT REJECTS CLAIM STEMMING FROM FEARS OF CONTAMINATION

The Michigan Supreme Court, in a 7-2 decision, rejected a claim for relief from property owners living near a Superfund site who sought to recover monetary damages in a nuisance claim. In their claim, the residents had asserted that their property had depreciated because of public perception about contamination and not actual contamination on their land.

The case, *Adkins, et al. v. Thomas Solvent Company, et al.*, may set the tone for similar cases across the country,

attorneys close to the case say. One attorney says that other states have shown interest in the case. "I would think it might be of persuasive value in other states," he says. The case involves the Verona Well Field Superfund site in Battle Creek, MI.

Through its decision, the court acknowledged that "reasonable" limits had to be set on what constituted a nuisance claim, the attorney says. He says the court recognized that had a limit not been established, "there would be an infinite number of possibilities" to recover damages from polluters. In its decision, the court also considered the prospect that a polluter's resources might be drained away from "those who have suffered actual damage to pay for claims based on unfounded fears," and acknowledged in this case that the Thomas Solvent Company sought bankruptcy protection, according to an attorney for the American Insurance Association (AIA), which filed an amicus brief for the defendant in the case.

The court reversed an earlier appeals court decision, which had emphasized that a nuisance claim did not have to be supported by evidence that physical intrusion had occurred on the property owner's land. The appeals court then had granted the defendant's appeal to a higher court. Originally, a state circuit court had granted summary disposition for the defendants, "concluding that any damages suffered by the plaintiffs resulted from unfounded public perception."

"This is a case in which plaintiffs were trying to expand the nuisance claim," the AIA source says. Private nuisance is proved when the plaintiff shows "the defendant was responsible for producing contaminants capable of interfering with the use and enjoyment of the plaintiff's property and that there was in fact a significant interference," the court said. Although the plaintiffs claimed an "intangible" injury, rather than a "concrete" injury, the courts, in concurrence with the appeals court, did not reject the claim on the grounds that the intrusion was "intangible." In the majority opinion, Justice Boyle wrote that negative publicity from "unfounded fear about dangers in the vicinity of the property does not constitute a significant interference with the use and enjoyment of land." The AIA attorney says that the court pointed out that public opinion changes, and the value of the property may change in time.

The property owners had to prove "an actual entry or a threat of danger to the plaintiff's property," an attorney close to the case says. The property owners acknowledged the contamination from the Superfund site had not spread to their property, nor was it expected to ever reach the property, according to the case. "These people never had their properties threatened, let alone endangered," he adds.

The 22 plaintiffs in the case live near two tracks of contaminated land owned by the Thomas Solvent company. A groundwater divide exists between the sites and the homeowner's property, so that the contaminated groundwater could not have migrated to the plaintiffs' property, both parties had agreed, according to the circuit court. Originally, about 50 plaintiffs had filed suit for damages and injuries against Thomas Solvent Company, claiming that toxic chemicals and industrial wastes were released accidentally or intentionally at sites owned by defendants, the court said. Additional claims were filed in continuing trespass, strict liability and ultrahazardous activities. The claims were later narrowed to a nuisance claim when it was found that contaminants had not reached the property of 22 plaintiffs (*Cora Bell Adkins et al. v. Thomas Solvent Company et al.*, Michigan Supreme Court No. 88897, July 28, 1992).

Following $150-million settlement between EPA, industry PRPs

COMPANIES HAIL ORDER FINDING STATE LIABLE FOR 85% OF CLEANUP COSTS

A group of industrial companies facing liability at a California Superfund site are claiming victory after a federal magistrate said in a July 30 preliminary order that the state is liable for at least 75% and possibly 85% of the cleanup costs. But California officials contend the state did nothing more than regulate the site and therefore should not shoulder the costs of cleaning up industrial polluters' waste. The state is expected to challenge the order if it becomes final.

The order from Los Angeles Special Master Harry Pcetris comes just as 18 industrial parties in a settlement with EPA agreed to pay $150-million in cleanup and oversight costs at the Stringfellow Superfund site in Riverside, CA. The July 30 order allocates 75% or 85% of total cleanup costs to the state—depending on whether it is found liable under federal Superfund law or state laws, respectively—and 10% to J.B. Stringfellow, owner of the dump. The companies' share therefore would be as little as 5% of total cleanup costs, which are estimated at up to $800-million according to a state source.

EPA has said it will not collect from the industrial parties until the companies are able to collect from the state, an industry attorney says.

State officials say the order is flawed, arguing the state acted solely as a regulatory agency with no monetary interest in the site.

"It is bad public policy to impose upon the taxpayers the costs of cleaning up a site where the state's only role was as regulator," says an attorney for the state. He adds that nothing can justify ordering the state to pay millions to clean up a site that has been used for private companies' waste.

But an industry attorney says the state opened the hazardous waste dump based on flawed geological studies of the site. The reason the site has leaked contaminants, he argues, is that the studies "missed all clues that it would not be a good place" for a hazardous waste site: therefore the state is liable, she said.

A 1989 jury trial found the state liable for cleanup at the site, but left open the question of what share the state should pay. Special Master Peetris conducted a fact finding hearing from April 6, 1992 to June 17, 1992. Peetris' final recommended order and opinion, including findings of fact and conclusions of law, is forthcoming. The order is subject to review by the presiding federal judge.

The Stringfellow site operated as an industrial waste disposal facility from 1956 to 1972. Approximately 34 million gallons of industrial wastes were dumped in unlined ponds throughout a 17-acre area, according to EPA. The recent cleanup agreement consists of two consent decrees lodged on July 30, 1992 and an administrative consent order. The agreement calls for construction of groundwater cleanup systems, tests of soil vapor extraction to treat contaminated soils, and overall monitoring of the site (*United States of America v. J.B. Stringfellow, Jr.*, CV 83-2501 JMI, United States District Court for the Central District of California, No. CV 83-2501, July 30, 1992).

NEW YORK REACHES $30-MILLION TOXIC WASTE SETTLEMENT WITH 111 COMPANIES

New York City and the state of New York July 30 reached agreement with 111 companies for $30.4-million for the cleanup of toxic waste that was illegally disposed of in five New York City landfills. The settlement is the fourth in New York's ongoing Superfund battle against 124 companies who dumped their waste or arranged to have their waste dumped over a period of eight years. Under the settlement companies will reimburse the state and the city for cleanup costs as well as for natural resource damages.

Because the waste was dumped illegally, an attorney close to the case sees the settlement as significant. "There aren't many cases where you have this little information. It's very hard to put together any kind of a case based on circumstantial evidence," he says. The settling companies include: The New York City Transportation Co., Miller Brewing Co., The Dow Chemical Co. and Westinghouse Electric Corp. The largest contributor to the settlement is General Motors Corp., paying over $1.8-million.

From 1972 to 1980 a group of waste-hauling companies—the Mahler companies and Samson Tank Cleaning—illegally dumped liquid industrial waste in five NYC landfills: Edgemere landfill, Pelham Bay landfill, Brookfield landfill, Fountain Avenue landfill, and Pennsylvania landfill. According to the complaint filed by the city and the state, the transport companies gained access to the city landfills by bribing employees in the city's sanitation department.

The city learned of the illegal dumping in 1982 as a result of criminal charges for illegal dumping brought against one of the companies in the state of Pennsylvania. In 1985 the city brought a Superfund lawsuit against 14 of the generators and in 1988 settled with a group of seven defendants. The city later settled with six other defendants in two separate settlements.

The state and city later identified numerous other potentially responsible parties which they believed dumped waste at the site. In December 1991 the city and state notified these parties of their possible Superfund liability. Since that time the parties have been engaged in negotiations to determine the volume of waste that they transferred to the waste hauling companies for disposal.

Under the terms of the settlement the companies will either pay the city a specified amount within 30 days, or give the city a funding agreement with the intent of paying the city before June 1995.

According to the attorney close to the case, the city and state are still negotiating with 15 parties and a settlement with one of the parties is expected soon. The settlements together provide that the defendants will pay approximately $30.4-million: $27.5-million to the city for landfill cleanup and $2.9-million to the New York state Department of Environmental Conservation for natural resource damages.

APPEALS COURT DENIES U.S.'S PETITION FOR REHEARING IN ALCAN CASE

Alcan Aluminum Corp. has scored another victory as the U.S. Court of Appeals for the 3rd Circuit July 30 denied a request by the government to rehear en banc a case involving cleanup costs for a Pennsylvania Superfund site.

The U.S. appealed a May 14 decision by the court arguing the decision contained several errors "which could destroy the utility of summary judgement procedures in CERCLA litigation." The 3rd Circuit in its decision overturned an earlier ruling by a district court, saying the lower court erred in assigning sweeping liability to Alcan.

The case involves the Butler Tunnel site in Pittston, PA where Alcan is a potentially responsible party. A district court in Pennsylvania held Alcan liable for cleanup costs in the amount of $473,790. Alcan says that the level of hazardous substances in the emulsion it sent to the site was below naturally occurring levels and therefore could not have contributed to the contamination.

At press time it was unclear whether the U.S. would appeal to the Supreme Court (*U.S. v. Alcan*, U.S. Court of Appeals for the 3rd Circuit, No. 91-5481, July 15, 1992).

Superfund Report Litigation Quick-Look — Update of 12 Cases

LENDER LIABILITY

Fleet Factors: U.S. Appeals Court ruled that a secured lender could be liable for Superfund contamination at a borrower's facility, if the lender had the capacity to influence borrower's decisions on hazardous waste. Court ruled "It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable...." (U.S. v. Fleet Factors Corp., U.S. Court of Appeals, 11th Circuit, 89-8094)

Suggestion for rehearing was denied July 17. Attorneys for Fleet filed a petition for review by U.S. Supreme Court Sept. 21. Supreme Court denied Fleet's petition Jan. 14, sending the case back to the district court. **U.S. had requested and been granted a stay in the case to evaluate the impact of EPA's proposed rule on lender liability. The case was recently reactivated and the court has requested that motions for summary judgement be filed with the court by July 31 with replies due by Aug. 28.**

MUNICIPAL LIABILITY

Goodrich v. Murtha: A group of towns have asked federal district court to adopt EPA's policy on municipal liability as law, thereby protecting cities and towns from Superfund liability if they only contributed trash to a site. Other PRPs object, claiming the towns should share in cleanup costs. (B.F. Goodrich Co., et al., v. Harold Murtha, et al., v. Ridson Corp., et al., U.S. district court for Connecticut, N-87-52)

Towns filed for summary judgment May 31, 1990. Court denied summary judgment motion Jan. 8, 1991 ruling there is no exemption for municipal solid waste in CERCLA. Court of Appeals for the 2nd Circuit May 8 granted motion for interlocutory appeal. The towns filed their brief June 24. Appellee's brief and a friend-of-the-court brief from industry trade groups were filed July 24. Towns' filed reply August 7. The 2nd Circuit ruled March 12 that municipal trash is potentially a hazardous waste under the Superfund law, stating that despite the "burdensome consequences" of such a designation, an exemption for cities and towns would thwart the language and purpose of the statute.

The Laurel Park Coalition in response to a request from the district court has filed a brief which demonstrates its third-party claims filed against 1,151 propspective parties exist in the court's records. A group of defendants, the General Waste Stream Defendants Liason Group, May 22 filed for summary judgement on the basis that there is no evidence that they sent any hazardous substances to the Beacon Heights and Laurel Park sites.

Operating Industries, Inc.: Over 64 industrial companies are suing 29 municipalities, the County of Los Angeles, and the California Dept. of Transportation to recover the costs of cleaning up the Operating Industries Landfill Superfund site in Monterey Park, CA. (Transportation Leasing Company, et al., v. The State of California (CalTrans), et al., U.S. District Court, Central District of California, No. 89 73686.) **Judge William Byrne ruled from the bench July 21 that the cities "owned or possessed" trash generated by residents and local businesses within their borders and transported by private haulers to the site. Court is expected to issue a written opinion in the next several weeks. The case will go to trial to determine how much waste originated in each city and was sent to the OII site, whether the trash contained hazardous substances, and ultimately for what share of total cleanup costs cities may be held liable.**

INTERSTATE WASTE TRANSPORT

Chemical Waste Management Inc.: An Alabama law that would impose two fees on the disposal of hazardous waste at commercial waste facilities in the state is being opposed by Chemical Waste Management Inc. In May 1990 the 11th Circuit Court of Appeals held that the law, which imposed an additional $72 per ton fee on waste generated outside of Alabama, violated the U.S. commerce clause but rejected the company's challenge to a $25.60 base fee fee on all waste disposed of at facilities within the state. The Alabama State Supreme Court adopted the circuit court's opinion on the base fee, however, reversed the court's decision on the additional fee. (Chemical Waste Management Inc., v Guy Hunt, Governor of Alabama, et al. U.S. Supreme Court No 91-471 Oct. 1991)

The U.S. Supreme Court granted CWM's petition Jan. 27 agreeing to rule on one portion if the law which allows Alabama to place a $72 differential fee on out-of-state waste. CWM filed its first brief March 10, the state replied April 8 and CWM responded to the state's reply April 15. Several amicus briefs have filed in support of CWM. **The court heard oral arguments in the case April 21 and on June 1 reversed and remanded the state supreme court's decision.**

HAZARD RANKING SYSTEM

Edison Electric: The Edison Electric Institute, a trade association representing investor-owned electric utilities, has mounted a legal challenge to EPA's revised Hazard Ranking System. The revised HRS is used to decide what sites should be placed on the Superfund list. The revised HRS was released in November of 1990. (Edison Electric Institute v. USEPA, U.S. Court of Appeals for the Dist. of Columbia, 91-1125)

EEI filed a preliminary statement of issues April 15. **Parties petitioned the court last year to defer the briefing and oral arguments schedule. Court agreed and the case has been stayed indefinitely. Parties are now trying to settle out of court.**

INSURANCE POLICIES

Montrose v. Admiral: A chemical corporation facing liability for bodily injuries and property damage at two hazardous waste sites sought declaratory judgment, arguing that its insurer was required to defend and indemnify the company. (*Montrose Chemical Corp. of California v. Admiral Insurance Co.*, Supreme Court of California, No. S026013)

A trial court entered summary judgment for the insurers, and the chemical company appealed. The Court of Appeal of the State of California Second Appellate District Jan. 22 1992 reversed the lower court ruling, finding that a company is

entitled to coverage for pollution liability stemming from the disposal of hazardous waste, though the actual disposal predated the inception of the policy in question. The court rejected insurers' argument that they could limit coverage for ongoing injuries to a single policy period. The insurance company filed a petition for review in the Supreme Court of California and review was granted May 21. **Montrose filed its first brief July 22 and a reply brief by Admiral is due by September 10. The court also granted a joint motion by the parties to set a deadline of October 12 for all amicus briefs to be filed.**

NATURAL RESOURCES

Coeur d'Alene Tribe of Idaho: The Coeur d'Alene tribe, asserting its authority as a natural resource damage trustee under CERCLA, is suing a number of mining and smelting companies for ecological damages to beds and banks of the Lake Coeur d'Alene and adjoining rivers. (Coeur d'Alene Tribe of Idaho f. Gulf Resources & Chemical Corporation et al., U.S. District Court of Idaho, No. CIV 91-0342N HLR, July 31, 1991.) **In a March 20 amicus brief, the U.S. asked the court to dismiss the case as premature. The tribe and two parties in the case have argued against the motion to dismiss, and the tribe has asked the court for a stay in the case until EPA completes remedial action/feasibility study at the site.**

BANKRUPTCY

National Gypsum Co.: A federal district court in Washington has ruled that companies seeking protection from their creditors are not immune from Superfund liability. This decision marks a first-ever reading on the intersection and of bankruptcy law and natural resource damage claims sought under Superfund. The court ruled that federally-assigned natural resource damage trustees must make their claims for future response costs during bankruptcy proceedings or lose their chance of getting the money. (*National Gypsum Co. v. Aancor Holdings, Inc.* No. 3-91-1653 H, Feb. 12, U.S. District Court for the Northern District of Texas, Dallas Division.)

NATIONAL CONTINGENCY PLAN

State of Ohio: Two years after filing an appeal, nine states have presented the U.S. Court of Appeals for the District of Columbia with their first brief. The 199-page document spells out the states' charges that the National Contingency Plan goes against the intent of Congress by assigning the role of cost in cleanups and improperly allows cost considerations to enter into human health decisions. The states' also motioned the court to reconsider allowing memos on OMB's role in rule-making into the record. (State of Ohio et al. v. U.S. EPA and William K. Reilly, U.S. Court of Appeals for the District of Columbia, March 10, 1992 No. 90-1276 and 90-1439) **Thirteen states filed an amicus brief in support of the states' motion and brief. But the court, in an April 29 order, dismissed the state's motion to supplement the record, and ordered the states to file a corrected brief omitting references to the "extra-record" material. Oral arguments have been scheduled for Feb. 3, 1993 and final briefs must be submitted by November 9.**

CAPACITY ASSURANCE PLANS

State of New York: In an effort to curb the "mismanagement" of out-of-state waste New York in December filed suit against EPA charging that the agency has failed to carry out its mandatory duty to sanction and withhold Superfund money from states that fail to comply with their capacity assurance plans. EPA requires that each state develop a plan to assure the availability of in-state or out-of-state treatment disposal for all hazardous wastes that are expected to be generated within the next 20 years. (State of New York v. William K. Reilly, U.S. District Court for the Northern District of New York, No. 91-CV-1418, May 4, 1991) **Two months ago EPA filed a motion to dismiss and New York has filed a response to that motion. A New York state county and two towns have filed a motion for intervention claiming that EPA has failed to withhold Superfund money from the northeastern states leaving the states free to dispose of their waste in the only licensed commercial landfill for hazardous wastes in the northeast located in Niagara county.**

State of South Carolina: In its battle to cut back on out-of-state waste entering the state, South Carolina in December 1991 charged EPA with failing to enforce legal sanctions when North Carolina fell short of its capacity assurance plan. (South Carolina v. William K. Reilly, U.S. District Court for the District of Columbia, No.91-3090) **The court May 7 dismissed the case, saying that South Carolina had not shown EPA had violated a "non-discretionary duty" and that the state failed to allege that EPA had violated Superfund by releasing fund money to non-complying states. South Carolina has asked the court for permission to amend the complaint, adding new charges against EPA.**

HAZARDOUS SUBSTANCES

Alcan Aluminum Corp.: The 3rd Circuit Court of Appeals overruling a Federal district court in Pennsylvania found in May that Alcan Aluminum Corp. could not be held liable for cleanup costs at the Butler Tunnels site in Pennsylvania and remanded the case back to the district court. "The District court must permit Alcan to attempt to prove the harm is divisible and that the damages are capable of some reasonable apportionment," the 3rd Circuit said. (*U.S. v. Alcan Aluminum Corp. et al.*, U.S. Court of Appeals for the 3rd Circuit, No. 91-5481, May 14, 1992) **The U.S. July 1 petitioned the court for a rehearing. Alcan has filed a response to that petition. The court denied the government's request July 30. It is unclear whether the U.S. will appeal the case.**

CITY SUES 28 INSURERS TO RECOVER COSTS INCURRED AT LOCAL LANDFILL

Facing millions of dollars in Superfund cleanup costs at a municipal landfill, the City of Fresno, CA has sued 28 insurance companies to recover its losses. Claiming a breach of contract on the part of its insurers, the city is seeking coverage for all past, present and future costs arising from environmental cleanup of the landfill.

In its July 1 complaint, Fresno alleges in part that its insurers "willfully and in bad faith interpreted their policy provisions and the factual circumstances so as to resolve known ambiguities and uncertainties against the City of Fresno and to their own interest." The city alleges that the insurance companies failed to warn the city that its environmental claims would not be covered and to represent consistently the scope of their policies' coverage.

The city asserts that the insurers should be judicially barred from using the pollution exclusion in post-1970 policies to refuse coverage, pointing to language by the insurance industry indicating that the clause was not meant to reduce coverage. Fresno points to a recent decision in West Virginia's highest court, in which the court comprehensively reviewed the drafting history of the policies and found that insurers meant the pollution exclusion to be merely a restatement of the occurrence clause, thereby keeping in place coverage for gradual pollution damage (see *Superfund Report*, June 17, 1992, p.25).

The case centers on the Fresno Sanitary Landfill Superfund site, which the city owned from 1937 to 1989. The city closed the landfill in 1989; the facility had been used primarily for municipal solid waste disposal. Following tests by EPA and the state, the landfill was added to the national priorities list in 1989.

The city received a demand letter from EPA in April 1990 directing the city to fund an investigation and cleanup at the site. In September 1990 Fresno signed an administrative consent order with the agency mandating the investigation, prevention, mitigation and remediation of environmental damage at and around the site.

To date Fresno has spent $3-million toward the cleanup effort, according to the complaint. "Because of continually increasing costs, the process has been and will be a great financial burden" on the city. Fresno has insufficient information to determine the magnitude of future environmental actions associated with the site, but is seeking coverage "for all sums [the city] has expended and may have an obligation to expend in the future with respect to Fresno Sanitary Landfill actions," the complaint says (*City of Fresno, a Municipal Corporation v. Admiral Insurance Company, et al.*, Superior Court of the State of California in and for the County of Fresno, No. 464100-7, July 1, 1992).

Technology

DOE AND EPA TESTING USE OF ELECTROKINETICS AS REMEDIATION METHOD

Researchers working separately under EPA and the Department of Energy are testing the applications of electrokinetic soil processing as an in situ method to treat heavy metals that contaminate soil. The process requires electrodes to be planted into the ground; through their electrical charge the electrodes attract the heavy metals, according to DOE.

The electrokinetic process has existed since the 1940s, according to DOE, but it has been limited to solidifying soil slurries and to extracting water from liquefied soils and concretes. "One of the reasons this technology has been turned to site remediation is because of the attention the environment has received for the last ten years," an EPA source says.

The costs of the process are lower than other available methods such as soil washing and dumping, says a source with Electrokinetics, Inc., the company working with EPA. However, the availability of electricity in the area of contamination would also play a role because electrokinetics is an "intensive energy process," an EPA source says.

Electrokinetics, Inc. is currently testing the emerging technology as part of EPA's Superfund Innovative Technology Evaluation (SITE) program. The company is conducting a pilot study on privately-held land in Baton Rouge, LA that harbors soil containing 9% lead from leaded gasoline, says a source with the lab. To treat the contaminated soil, electrodes have been implanted in the ground on the site three to five meters apart. Because of the high amount of lead in the soil, the site is difficult to treat, a source with the company says. The pilot study will last another year, he says.

Eventually the technology may be used at Superfund sites after it has been further tested in SITE's demonstration program, an EPA source says. According to the source, several sites have heavy metal contamination. The electrokinetic process also has potential for cleaning up radionuclides, radioactive particles such as uranium, radium and thorium, the source says. About 30 Superfund sites contain radionuclides, he adds.

DOE's Sandia National Laboratories is also experimenting with electrokinetics and is in the laboratory stages of testing. The lab expects to conduct field studies within the next two years, according to a source with the DOE lab.

The lab, in joint efforts with Sat-Unsat researchers, has been concentrating on remediating the heavy metal chromate, according to a bulletin from the lab. "The real significance of what we have done is that we can remove the chromate from unsaturated soil," the source says, referring to soil containing 10% moisture.

An EPA source working with the Electrokinetics lab says the two labs are not competing. "The more people we get working on this, then the quicker we will see . . . commercial applications," he says.

Innovative technique would enhance vapor extraction's effectiveness

DOE TESTING METHOD FOR REMOVING CONTAMINANTS FROM SOIL, SILT, CLAY

A Department of Energy lab is testing a new cleanup technology that electrically heats soils to enhance the effectiveness of the emerging technology soil vapor extraction. The method would increase SVE's applicability and increase the rate of contaminant removal, according to a scientist at DOE's Pacific Northwest Laboratory (PNL) in Richland, WA.

Laboratory tests of the method have resulted in greater than 99% removal of volatile organic compounds from sand, a silty loam, and clay, according to PNL. Developers are considering the technology for DOE and Defense Department facilities and eventually private Superfund sites, a PNL source says.

While studies have shown SVE to be successful in cleaning up contaminated soils, the technique is limited in that it is effective only at sites with highly permeable soils contaminated with volatile organic compounds. The new technology, known as electrical remediation at contaminated environments (ERACE), would work on materials of low permeability and would treat semi- and possibly non-volatile chemicals, the scientist says. ERACE uses a six-phase soil heating technique, which is based on the ability to split conventional three-phase electricity into six phases, according to PNL. Six electrodes are placed in a circle and since each is at a separate phase, each one conducts to all the others allowing for a much more uniform heating pattern. Once soils are heated, vaporized contaminants are drawn up through a vapor extraction well.

PNL cites several advantages to heating soils to be treated by vapor extraction. Heating raises the contaminants' vapor pressure, increasing the removal rate. Further heating to the soil moisture's boiling point creates a source of steam to strip out less volatile compounds which soil venting alone does not remove, according to a fact sheet from PNL.

The six-phase electrical configuration is being tested for use of the innovative technology in situ vitrification, according to PNL.

Pilot-scale tests at DOE's lab have demonstrated uniform heating of soils, resulting in maximum steam for removing difficult compounds and increasing permeability of soils, according to PNL.

DOE plans to demonstrate the technology at the agency's Savannah River facility in Georgia, on a site contaminated with trichloroethylene and perchloroethylene. The agency is also eyeing its Hanford facility in Washington as a possible demonstration site.

Site / Construction Completion List

Site Name	State	Reg	Type of Doc.*	Date of Approval	NOID	Delete
Cannon Engineering Co.	MA	1	ICOR	9-30-91		
Darling Dump	VT	1	NAR	6-30-92		
McKin Co.	ME	1	PCOR	3-24-92		
Plymouth Harbor/Cannon	MA	1	COR	5-29-92	Draft	
Sylvester	NH	1	ICOR	4-8-92		
Action Anodizing	NY	2	NAR	6-30-92		
Beachwood/Berkeley	NJ	2	COR	5-3-91	7-12-92	1-6-92
Copper Road	NJ	2			10-19-88	2-22-89
Friedman Property	NJ	2			12-31-85	3-7-86
Katonah Municipal Well	NY	2	PCOR	7-7-92		
Krysowaty Farm	NJ	2			10-19-88	2-22-89
M & T DeLisa Lndfl**	NJ	2			12-18-90	3-21-91
Bruin Lagoon	PA	3	COR	3-27-92		
Chemical Metals Ind.	MD	3				12-30-82
Chisman Creek	VA	3	ICOR	12-21-90		
Enterprise Avenue	PA	3			12-31-85	3-7-86
Lansdowne Radiation	PA	3	COR	2-28-91	3-18-91	9-10-91
Leetown Pesticides	WV	3	PCOR	4-7-92		
Lehigh Electric & Eng.	PA	3			12-31-85	3-7-86
Matthews Electroplate	VA	3	COR	3-29-88	7-20-88	1-19-89
Middletown Road Dump	MD	3			9-3-87	4-18-88
New Castle Steel	DE	3	COR	8-17-88	9-22-88	3-17-89
Presque Ilse	PA	3	COR	3-8-88	7-28-88	2-13-89
Reeser's Landfill	PA	3	COR	2-5-90	3-2-90	5-31-90
Sealand Limited	DE	3	COR	3-27-92		
Taylor Borough Dump	PA	3	COR	12-30-88	??	
Voortman Farm**	PA	3	COR	3-9-89	3-24-89	5-31-89
Wade (ABM)	PA	3	COR	6-29-88	12-2-88	3-23-89
Westline	PA	3	COR	2-22-91	12-17-91	
A. L. Taylor	KY	4	COR	Not dated		
Alpha Chemical	FL	4	COR	Need Copy		
Brown Wood Preserving	FL	4	COR	12-31-91		
Distler Farms	KY	4	ICOR	7-9-92		
Gold Coast Oil	FL	4	ICOR	Need Copy		
Independent Nail	SC	4	COR	9-13-88		
Lee's Lane Landfill	KY	4	COR	3-18-88		
Luminous Products, Inc.	GA	4				12-30-82
Mowbray Engineering Co.	AL	4	COR	9-16-91		
Newport Dump	KY	4	COR	3-28-88		

Site Name	State	Reg	Type of Doc.*	Date of Approval	NOID	Delete
Parramore Surplus	FL	4	COR	11-4-88	11-29-88	2-21-89
PCB Spills, 243 m. road	NC	4			12-31-85	3-7-86
Pioneer Sand Company	FL	4	COR	12-21-91		
Tri-City Oil	FL	4			3-14-88	9-1-88
Triana/Tennessee	AL	4	ICOR	12-18-91		
Varsol Spill	FL	4			3-14-88	9-1-88
Walcotte Chemical CO.	MS	4				12-30-82
Woodbury Chemical	FL	4	NAR	6-25-92		
Adrian Wells**	MN	5	COR	7-20-92	Draft	
Belvidere Municipal Lf	IL	5	COR	6-10-92		
Cemetery Dump	MI	5	ICOR	9-11-91		
Chemical & Minerals Re.	OH	5				12-30-82
General Mills	MN	5	ICOR	6-5-92		
Gratiot County Golf	MI	5				9-8-83
IMC East Plant	IN	5			9-22-89	2-11-91
Johns Mansville	IL	5	COR	12-31-91		
Lehillier/Mankato	MN	5	COR	4-8-92		
Metal Working Shop**	MI	5	NAR	6-30-92		
Morris Arsenic Dump	MN	5			12-31-85	3-7-86
Northern Engraving	WI	5		Need Copy		
Old Mill	OH	5	ICOR	9-30-91		
Peterson Sand &Gravel**	IL	5	COR	9-12-89	9-22-89	2-11-91
Poer Farm Site	IN	5	COR	8-18-89	9-21-89	2-11-91
Tri-State Plating	IN	5	ICOR	6-10-92		
Union Scrap Iron &Metal	MN	5	COR	9-18-90	9-25-90	9-10-91
Wedzeb Enterprises	IN	5	COR	9-26-90	3-5-91	9-10-91
Whitehall Mncpl. Wells	MI	5	COR	9-7-90	9-21-90	2-11-91
Whittaker Corp.	MN	5	PCOR	4-7-92		
Windom Mncpl. Ldfl	MN	5	ICOR	12-24-91		
Bayou Sorrel	LA	6	COR	5-26-92		
Cecil Lindsey	AR	6	COR	3-16-89	3-28-89	9-22-89
Compass Industries	OK	6	COR	6-30-92		
Crystal City Airport	TX	6	COR	12--91		
Harris (Farley Street)	TX	6			9-3-87	4-18-88
Highlands Acid Pit	TX	6	ICOR	6-29-92		
Industrial Waste Contrl	AR	6	COR	6-10-92		
Mid South Wood Products	AR	6	ICOR	9-28-89		
Pagano Salvage	NM	6	COR	9-12-91		
Triangle Chemical Co.	TX	6	COR	9-27-90		
Aidex Corp.	IA	7	COR	6-30-92		

Site Name	State	Reg	Type of Doc.*	Date of Approval	NOID	Delete
Big River Sand**	KS	7	COR	9-29-88	Draft	
Conserv. Chemical Co.	MO	7	ICOR	9-23-91		
Fulbright/SAC River	MO	7	PCOR	6/3/92		
Hydro-Flex Co.**	KS	7	COR	6-30-92		
John's Sludge Pond	KS	7	COR	1-31-91	9-10-91	1-6-92
La Bounty	IA	7	COR	12-30-88		
Lawrence Todtz	IA	7	COR	9-11-91		
Rose Park Sludge Pit	UT	8	COR	6-17-92 Need Copy		
Woodbury Chemical Co.	CO	8	PCOR	6-30-92		
Advanced Micro Devices	CA	9	ICOR	3-25-92		
Celtor Chemical Works	CA	9	COR	9-29-89		
CTS Printex, Inc.	CA	9	COR	3-31-92		
Del Norte Pesticide	CA	9	PCOR	3-26-92		
Fairchild Semiconductor	CA	9	ICOR	3-25-92		
Firestone Tire & Review	CA	9	ICOR	12-24-91		
Jibboom Junkyard	CA	9	COR	3-31-88	5-24-89	9-10-91
Mountain View Mobile	AZ	9			9-3-87	4-18-88
PCB Warehouse, Gaum	Gua	9			12-31-85	3-7-86
PCB Wastes, Pacific Ter	PTT	9			12-31-85	3-7-86
Synertek, Inc.	CA	9	ICOR	3-25-92		
Taputimu Farm, Samoa	Sam	9			12-31-85	3-3-86
Teledyne Semiconductor	CA	9	ICOR	3-31-92		
Toftdahl Drums	WA	10			8-12-88	12-23-88
United Chrome Products	OR	10	ICOR	12-27-91		
Western Processing	WA	10	ICOR	12-23-91		

Note:

* Documents the construction completion.
** No Action/Further Action
PCOR Preliminary Close Out Report
ICOR Interim Close Out Report
COR Close Out Report
NAR No action ROD w/Certification of Completion
NOID Notice Of Intent to Delete

Documents

POLLUTION INSURANCE
Court upholds alleged polluter claims

Ruling by a California appellate court upholds a chemical company's claim for insurance coverage of pollution even though the contamination occurred before the policy's inception. The ruling overturns a lower court's decision against Montrose Chemical Corp. by applying the "continuous trigger" theory that property damage is continuous and progressive throughout successive policy periods. The California Supreme Court granted a petition for review by the insurance company.
#4667 (37 pages)

STATE LIABILITY
New Jersey township lawsuit

Multi-million dollar complaint filed in a New Jersey court by Pennsauken Township and the Pennsauken Solid Waste Management Authority seeks reimbursement of past and future costs for cleanup of the township-owned landfill. The lawsuit names more than 500 defendants, including the state of New Jersey, other towns, a church and hundreds of small businesses. The landfill is not on the national priorities list, but the claim is based on New Jersey's "mini-Superfund" law and poses several questions of national scope, such as bankruptcy and insurance coverage.
#4669 (101 pages)

MUNICIPAL LIABILITY
Senator's letter to limit EPA claims

Letter to EPA Administrator Reilly from Sen. Frank Lautenberg (D-NJ) asks Reilly to "pursue an aggressive policy" to shield municipalities from lawsuits by private polluters. The Lautenberg letter praises EPA for rejecting a controversial allocation proposal that would have forced cities and towns to bear up to two-thirds of cleanup costs at Superfund sites. The letter requests a meeting with Reilly and the senator before the agency takes any further action.
#4668 (2 pages)

GOVERNMENT LIABILITY
Court order shifts claims to U.S.

Federal district court ruling holds the U.S. Department of Commerce responsible for cleanup of a site that had operated as a manufacturing plant during World War II. The order marks the first time a court has shifted Superfund liability claims against a private company to the federal government. The decision says the government was the effective "owner and operator" through its wartime efforts during the time contamination occurred, 1942-48. The ruling is expected to play a major role in the long-standing legal battle over the contaminated Love Canal site, the nation's first Superfund site.
#4670 (39 pages)

COST RECOVERY
EPA proposal expands claims

EPA proposal would allow the agency to recover indirect costs from potentially responsible parties for Superfund cleanups. The draft cost recovery rule would expand EPA claims against alleged polluters to include overhead costs, including legal fees, at Superfund sites, except for those sites where no PRPs have been cited, where PRP settlements make up less than 100% of response costs, or at federally controlled sites. The proposal includes a table of hourly rates EPA may charge PRPs for agency time spent on Superfund cases.
#4672 (69 pages)

LAND BAN
EPA puts off treatment of debris

EPA rule sets land disposal restrictions for 20 newly listed wastes, retaining current methods for identifying toxics but rejecting, for now, the listing of contaminated debris as hazardous. The rule postpones standards for the treatment of debris until May 8, 1993. The rule, along with the pending release of the mixed waste rule, will determine the treatment, disposal and cleanup procedures for most waste facilities throughout the country.
#4674 (215 pages)

ENVIRONMENTAL DOCUMENT SERVICE: How to Order Studies and Analyses

All documents listed in this section are available through the Environmental Document Service, from the publishers of *Inside EPA, Environmental Policy Alert, Superfund Report and Clean Air Report.* You can order any of these documents by calling 1-800-424-9068 (in the Washington, DC, area, call 703-892-8507). Each order should refer to the document order number at the end of the descriptive item and the short title used in the document entry. If you prefer to order by mail: Environmental Document Service, P.O. Box 7167, Ben Franklin Station, Washington, DC 20044.

Document processing cost is $0.25 per page -- unless otherwise indicated -- and the **MINIMUM ORDER FEE IS $10.00**. For a copy of the entire Environmental Document Service catalog, or further information, call our special hotline.

Superfund Interview

ALL ISSUES ON THE TABLE FOR REAUTHORIZATION, PROGRAM CHIEF DON CLAY SAYS

The upcoming reauthorization of Superfund in the 1993/94 session of Congress is forcing EPA and even the White House to take a closer look at how the program is actually working. According to Don Clay, assistant administrator for Solid Waste & Emergency Response, all Superfund issues are on the table for debate. Clays says that internal review of the program is already underway in an effort "to understand the current statute and determine what's working and what's not working."

The agency has "really gone all out" in preparing for reauthorization so EPA can say to Congress "this is how the program is working under the statute," Clay says. Currently Clay sits on an interagency White House-led workgroup which is charged with developing administration policy on Superfund. The group met for the first time July 21 (see *Superfund Report*, July 29, 1992, p.4). The group is in the "fact-finding and educational stages in order to come to grips with the program," Clays says. Clay sees the agency's role in the group as significant. "In the end we have the information about what's working and what's not working and I think we can bring that to bear."

Within the agency, there are two levels of groups that are focusing on reauthorization issues, according to Clay. A series of option papers is being developed, which will be circulated internally with the issues left "wide-open for debate," Clay says. "This time around we hope to have a reservoir within the agency of the best staff thinking on the key issues and the options for development." The papers are designed to be "option neutral" Clay says. "They are not designed to defend the status quo, they are designed to question everything."

Don Clay

The issues for the option papers include: liability/enforcement, risk assessment, financing, research, states, remedy selection, contractor issues, federal activities, other agencies' future jurisdictions, and technical amendments. Clay chairs a workgroup which is focusing on the option papers. A second group, a career-level group contains two subgroups—an office directors' panel chaired by Bruce Diamond, director of the Office of Waste Programs Enforcement, which is essentially a clearinghouse, Clays says, and the group which is developing the option papers.

The primary issue people want to focus on is who pays. The agency is trying to determine who pays for what, he says. Clay says the agency hopes to isolate for Congress some of the long-term cleanup costs that the agency is incurring. "Through the use of the agency's Superfund Accelerated Cleanup Model we are in fact starting to isolate some of the long-term cleanup costs," he says. "One of the key issues I hope the Congress looks at is in fact what we are paying for the long- term groundwater restorations," and what they are actually worth.

Clay says the the liability system of who pays for Superfund cleanups is an issue which Congress will focus on. The big question remains "do we stay with strict, joint and several or go to a public works program." The role of states will also play into reauthorization, according to Clay, as well as federal facilities, which is an issue "that is on the table now." Clay says the agency has work going on at various levels but has completed the issue paper on liability and enforcement and is planning a meeting with his agency workgroup to discuss it.

Clay sees Superfund as a maturing program and one he says he is pleased with. "It's beginning to get re-energized and it's moving now." Clay says the agency plans to enter reauthorization with an open mind with the main contribution being "here's the program you [Congress] wrote—yes it has pluses and minuses but everything has pluses and minuses and at the appropriate time we will be happy to share what these are." But meanwhile the agency is just going to keep moving forward, he says.

One of the concerns in the process is making sure the existing program is on track while the changes to the statute are up for debate, according to Clay.

Clay says he tells people who want to focus on reauthorization "that Congress generally passes this [Superfund] in even numbered years, election years, plus or minus sixty days of the general election so that most people would not predict anything before 1994, and some pessimists might say 1996."

"I point out to everybody we are going to spend together hundreds of millions of dollars under the current statute before anybody realistically expects any change. We want to keep working so that what we have is sufficient" and not just focus on reauthorization as a way to solve the program's problems, Clay says